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THE FEDERAL DIVISION OF PUBLIC INTEREST SUITS BY AN ATTORNEY-GENERAL

ABSTRACT

Until recently, the orthodox position was that the Attorney–General of any polity had standing in a public interest suit merely by showing that the suit was brought to enforce compliance with the Constitution. This liberal and pragmatic approach to standing was reinforced by a system of statutory rights of removal of causes to the High Court and rights of intervention and the ever-broadening standing rules for ordinary citizens. This development ended in the Bishops Case (2002).[1] In that case, the majority refused the federal Attorney-General standing because he could not show the existence of a 'matter' under Chapter III of the Constitution. The majority derived from the concept of 'matter' a new constitutional implication limiting the role of each Attorney-General within the federation. The real animus of this new restriction lies in judicial choices about competing public interests in the administration of justice and the appropriate response to the problem of selective political enforcement of the law. The Court disguised these policy choices in the matter concept. The reasoning is symptomatic of the current High Court's reasoning on Chapter III matters.

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[1] *Bishops Case* (2002) 209 CLR 372.

I INTRODUCTION

Amongst the many traditional functions of the Attorney-General is the vindication of the public interest through litigation to enforce public rights.[2] The Attorney-General may do so, either *ex relatione* (the 'relator action') or *ex officio*.[3] In a unitary system of government it is clear that the Attorney-General can sue on behalf of, or in the interest of, any person in that polity. In a federal system of government, this proposition is more problematic. The Australian Constitution recognises the existence of 'the people' of the States and their participation in the larger political community of the Commonwealth.[4] Upon the formation of the Commonwealth, there were seven polities, each with its own Attorney-General. Today there are nine holders of the office of Attorney-General at the level of the Commonwealth, the six States and the two self-governing Territories.[5]

Early in its history, the High Court was asked which Attorney-General was the appropriate Attorney-General to pursue litigation in respect of a given right or interest described as 'public'. It had to determine whose 'public interests' each Attorney-General could vindicate and under what circumstances. Starting from *Attorney-General (NSW); ex rel Tooth & Co Ltd v Brewery Employees Union of New South Wales* ('the *Union Label Case*') (1908),[6] the Court adopted an ever broadening liberal and pragmatic approach to the question of the standing of the Attorneys–General in public interest litigation. This approach was reinforced by a system of statutory rights of removal of causes to the High Court and rights of intervention in proceedings where constitutional matters were raised.[7] The liberal and pragmatic approach came to an end in *Re McBain; Ex parte Australian Catholic*

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2 In this paper, the term 'public rights' is used to denote rights which persons can enjoy on a non–exclusive basis.

3 These actions are explained below, in part II.C.

4 The Preamble to the Constitution records that 'the people' of five States 'have agreed to unite in one indissoluble Federal Commonwealth'. Covering clause 5 states that the Constitution binds the 'people of every State and of every part of the Commonwealth'.

5 The tenth Australian jurisdiction, Norfolk Island, has a 'Chief Minister and Minister for Intergovernmental Relations' who also appears to discharge the functions of an Attorney-General. The Norfolk Island government webpage describes the Chief Minister as responsible for 'Legal Matters, Courts…[and] Civil Legal Proceedings (Administration)': see: <<http://www.norfolk.gov.nf/>>.

6 *Attorney-General (NSW); ex rel Tooth & Co Ltd v Brewery Employés Union of New South Wales* (the '*Union Label Case*') (1908) 6 CLR 469.

7 *Judiciary Act* 1903 (Cth), ss 40, 78A and 78B: see below part III.B.

Bishops Conference (2002) ('the *Bishops Case*').[8] The reasoning in that case resulted in the drawing of a new implication from the text of Chapter III of the Constitution which limits the range of action that may be taken by the Attorney-General of each polity in the federation.

The approach to the federal jurisdictional concept of 'matter' in the *Bishops Case* contains a number of difficulties. In the main, these relate to the High Court's approach to doctrinal reasoning in matters affecting the federal judicial power. Doctrinal decisions about the existence or absence of a 'matter' reflect judicial choices about competing public interests in the administration of justice. In the *Bishops Case*, they also reflect the Court's response to the problem of selective political enforcement of the law. This paper seeks to identify this public policy dimension, and to demonstrate how certain features of contemporary judicial reasoning might result in the marginalisation of such considerations from the jurisprudence.

Part II of this paper outlines the traditional role of the Attorney-General in the enforcement of public rights and the gradual breakdown of the Attorney-General's monopoly over public interest litigation. The traditional role assumes a unitary state. The federal dimension is introduced in Part III, which reviews a century of judicial and legislative action to illustrate the liberal and pragmatic approach to the question of the standing of the Attorneys–General in constitutional matters. Part IV analyses the reasoning in the *Bishops Case* with an eye to identifying broader features in the Court's approach to constitutional implications drawn from the text of Chapter III of the Constitution.

II THE ATTORNEY-GENERAL AS GUARDIAN OF THE PUBLIC INTEREST

In early modern English legal thought, the monarch was regarded as 'the fountainhead of justice' and the protector of his or her people. This view of the monarch provided the intellectual backdrop for a rather wide–ranging 'guardianship' of the public interest by the executive. As the legal adviser and representative of the executive, the Attorney-General often found himself in the role of legal representative of the interests of the people. The first section of this paper reviews this traditional role of the Attorney-General (parts II.A–II.C) and its gradual breakdown through the broadening of the general law of standing (part II.D).

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8 *Bishops Case* (2002) 209 CLR 372.

A *The Attorney-General's Role in Public Administration*

Prior to the emergence of a strong central state in England, governance functions were performed by a series of local and regional authorities. Courts sought to control the exercise of public decision–making power through doctrines which attributed special legal consequences to (i) the performance of tasks charged with a 'public interest' (such as the 'common callings' of ferrymen, hotel–keeper and wharf–operator); (ii) the holding of 'public offices' (such as justices of the peace); and (iii) the discharge of what the law identified as 'public duties'.[9] The Crown also took some responsibility for the due administration of a number of bodies which were commonly regarded as possessing a 'public' character. These bodies represented a diverse range of charitable corporations, universities, municipal councils and utility corporations. Many were not part of the formal apparatus of executive government and did not exercise statutory powers. The common feature in these suits is that these bodies exercised power affecting the public in circumstances where no individual had standing to initiate proceedings against them unless he or she had suffered private injury. The Attorney-General's standing remedied this deficiency. This jurisdiction with respect to 'public' bodies is one of the historical precursors to the Attorney-General's more modern jurisdiction to enforce public rights.

The High Court has noted three historically interrelated litigation contexts in which the Attorney-General would pursue public interest suits against such public bodies.[10] The first involved the due administration of charitable trusts. The Attorney-General would sue to prevent the abuse of trust funds as the beneficiaries of such trusts were unable to sue. In this role, the Attorney-General was described as acting in the interests of the public in the Crown's role as protector of vulnerable subjects — the

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9 For a summary, see: Paul Finn, 'Public Function – Private Action: A Common Law Dilemma' in S I Benn and G F Gaus (eds), *Pubic and Private in Social Life* (1983); and Susan Kneebone, *Tort Liability of Public Authorities* (1998) 57–63. Common callings: Michael Taggart, 'Public Utilities and Public Law' in P Joseph (ed), *Essays on the Constitution* (1995) 214–21, 227–31. Public offices: F Mecham, *The Law of Public Offices and Officers* (1890); Paul D Finn, 'Public Officers: Some Personal Liabilities' (1977) 51 *Australian Law Journal* 313; and Paul D Finn, 'Official Misconduct' [1978] 2 *Criminal Law Journal* 307.

10 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (the '*Bateman's Bay Case*') (1998) 194 CLR 247, 259 (Gaudron, Gummow and Kirby J) and 280 (McHugh J); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (the '*Truth About Motorways Case*') (2000) 200 CLR 591, 608–9 (Gaudron J) and 627–9 (Gummow J), and sources cited therein; the *Bishops Case* (2002) 209 CLR 372.

Crown's role as *parens patriae*.[11] The second context was the Crown's right of visitation over corporations whose charter or governing statute did not name visitors. The visitor was able to enforce obligations between the corporation and members in situations where members lacked standing.[12] In the absence of a visitor, such rights could be enforced by the Attorney-General in the supervisory jurisdiction of the Court of King's Bench by way of information in the nature of quo warranto or a writ of mandamus.[13] The third context was the Attorney-General's suit to restrain statutory bodies from ultra vires actions interfering with pubic rights, particularly where this involved a misapplication of public funds or action incompatible with the due exercise of a body's powers and the discharge of its duties.[14]

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11 *Williams v Attorney-General (NSW)* (1913) 16 CLR 404. See also: J L J Edwards, *The Law Officers of the Crown* (1964) 155 and 287; *Re Belling* [1967] Ch 425; The origin of the term *'parens patriae'* is obscure. It usually denotes an obligation of protection between 'the Crown' and its subjects, particularly in the case of vulnerable subjects, such as children and persons under a disability. See: *Johnson v Director-General of Social Welfare (Vic)* (1976) 135 CLR 92, 95; *Carseldine v Director of Department of Children's Services* (1974) 133 CLR 345, 350–1; *Secretary, Department of Health and Community Services v JWB and SMB ('Marion's Case')* (1992) 175 CLR 218, 258–9 (cases on the duty of 'the Crown' to infants). Chitty noted that the King was charged with the duty to 'take care of such of his subjects, as are legally unable… to take proper care of themselves and their property': Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (1820 repr 1978) 155.

12 The inadequate concept of membership in many university corporations has periodically made the visitor's jurisdiction a matter of considerable significance: Suzanne Corcoran, 'Living on the Edge: Utopia University Ltd' (1999) 27 *Federal Law Review* 265 (membership); *Re University of Melbourne; ex parte de Simione* [1981] VR 378; *University of Melbourne; ex parte McGurk (Visitor)* [1987] VR 586; P M Smith, 'The Exclusive Jurisdiction of the University Visitor' (1981) 97 *Law Quarterly Review* 610; and R J Sadler, 'The University Visitor in Australia: *Murdoch University v Bloom*' (1980) 7 *Monash University Law Review* 59.

13 See also: Roscoe Pound, 'Visitatorial Jurisdiction over Corporations in Equity' (1936) 49 *Harvard Law Review* 369, 374ff; Stewart Kyd, *A Treatise on the Law of Corporations (2 Vols)* (1811 repr 1978), Vol II, Ch IV, sec I, esp 286–90 (quo warranto), Ch IV, sec II (mandamus generally); and H A Street, *A Treatise on the Doctrine of Ultra Vires* (1930) 13–5. Supervision over eleemosynary corporations was exercised by the Court of Chancery in accordance with its jurisdiction over trusts and charities.

14 *London County Council v Attorney-General* [1902] AC 165. See also: *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 588 (n 97), 592; *Attorney-General v Blake* [1998] Ch 439, 459–60; *Attorney-General (NSW) v Parramatta City Council* (1949) 49 SR (NSW) 283, 290–2.

B *The Traditional Public Law Standing Rule and the Guardianship Theory*

Standing rules limit the ability of persons to institute and maintain a proceeding before a court. They exclude some persons from obtaining the assistance of the courts in declaring and enforcing the law in circumstances where other persons could obtain that assistance. Both public and private law have standing rules but these are configured in different ways. In private law, the entitlement to a remedy, and the right to apply for that remedy, merge. Private law generally treats an applicant who has satisfied the material elements of the pleaded cause of action as having satisfied the standing requirement.[15] In public law, standing and the merits of the action are distinct. Standing is treated as a discrete preliminary issue addressing the applicant's right to apply for a remedy. Public law standing rules reflect the fact that the law's primary concern is not simply the control of governmental activity, but its control at the suit of persons affected by the activity in a particular way.[16]

For a long time in Anglo–Australian law, standing was denied to the ordinary person who could show no 'personal', 'private' or 'special' interest in the 'public' right to be vindicated — the Attorney-General was the only person who could sue. The Attorney-General filled a gap in the public law standing rule. This occurred both at common law and in equity, but it was most obvious in equity. Standing for equitable remedies in public law was heavily influenced by the circumstance that such remedies were often sought where the prerogative writs were unavailable or hedged by technicalities.[17] A typical circumstance lay in the use of equity to enforce statutory rights and obligations.[18] In this jurisdiction, equity's traditional standing

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15 *Bateman's Bay Case* (1998) 194 CLR 247, 264 (Gaudron, Gummow and Kirby J); *Truth About Motorways Case* (2000) 200 CLR 591, 626 (Gummow J); and Peter Cane, 'The Function of Standing Rules in Administrative Law' [1980] *Public Law* 303, 303–4.

16 Peter Cane, *An Introduction to Administrative Law* (3rd ed, 1996) 42.

17 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 579–82; and *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 156 (Gaudron J).

18 *Truth About Motorways Case* (2000) 200 CLR 591, 628. See generally: E I Sykes, 'The Injunction in Public Law' (1954) 2 *University of Queensland Law Journal* 114, 114–30; Itzhak Zamir, Lord Woolf and Jeremy Woolf, *The Declaratory Judgment* (2nd ed, 1993), 5.29–5.38; R J Sharpe, *Injunctions and Specific Performance* (1983) 249–87. Despite statements in some cases describing these interventions as part of equity's auxiliary jurisdiction, such classifications are not entirely historically accurate: R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines and Remedies* (3rd ed, 1992) 118–122 (classification of declaratory relief).

rule was that a member of the public could initiate proceedings to protect his or her private rights, but only the Attorney-General, acting in the public interest, could initiate proceedings to protect public rights. The traditional position was stated by Lord Wilberforce in *Gouriet v Union of Post Office Workers* ('the *Gouriet Case*') (1978):[19]

> It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out.

Lord Wilberforce claimed 'constitutional' status for this 'fundamental' rule. But even in 1978, this picture was inaccurate, as it ignored developments in the law of nuisance after *Boyce v Paddington Borough Council* ('the *Boyce Case*') (1903).[20]

C *Ex Officio and Relator Actions*

As a result of the historical rule on standing, the Attorney-General may, in public interest suits, sue ex officio and *ex relatione*. The Attorney-General sues ex officio when suing on his or her own initiative.[21] More commonly, an individual with no private right may seek the Attorney-General's fiat for a suit. Where the Attorney-General grants the fiat, the proceeding is conducted as the Attorney-General's suit *ex relatione* ('at the relation of') the individual and is known as a 'relator action'.[22] In this circumstance, the individual requesting the Attorney-General's intervention ('the relator') need not need to show a special interest.[23] The courts do not review the grant or refusal to grant a fiat.[24] At common law, the Attorney-General also has

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19 [1978] AC 435, 477.

20 [1903] 1 Ch 109. See below, part II.D.1.

21 Ex officio actions have always been more important in the Attorney-General's enforcement of the criminal law: see Edwards, above n 11, 262–7, 287.

22 See: J L J Edwards, *The Attorney General, Politics and the Public Interest* (1984) 138–52; and Edwards above n 11, 286–95.

23 *Attorney-General (Kew); Ex rel Duncan v Andrews* (1979) 145 CLR 573, 582.

24 *Barton v The Queen* (1980) 147 CLR 75, 91–4, 103, 109; The *Gouriet Case*, 488 (HL); *London Country Council v Attorney-General* [1902] AC 165, 167–8; *Bateman's Bay Case* (1998) 194 CLR 247, 258-9 (Gaudron, Gummow and Kirby J). See generally, Edwards, above n 22, Ch 6.

the right to intervene in any private suit which might affect the prerogatives of the Crown including its relations with foreign states. With the leave of the court, he might also intervene in any suit which raises any question of public policy on which the executive may wish to bring to the notice of the court.[25] By leave of the court, the Attorney-General may also appear as an amicus curiae, though such actions have been rare.[26]

Relator actions are idiosyncratic. In practice, such proceedings are conducted by counsel for the relator upon the undertaking that the relator will indemnify the Attorney-General against any cost order and that it will observe any limitation upon the submissions to be made. In law, the relator proceeding is treated as an action conducted and controlled by the Attorney-General rather than the relator.[27] The proceeding is as competent or incompetent as if it were brought by the Attorney-General ex officio. The Attorney-General may withdraw the fiat for the proceeding at any time.[28] The *Bishops Case* (2002) confirmed these features of the action.[29] Among other matters, that case addressed the peculiar circumstance of the relator's departure from its agreement with the Attorney-General as to the nature of the submissions to be made to the High Court. The Attorney-General then sought to intervene, putting submissions contrary to the relator. Six members of the High Court ruled that the Attorney-General could not be heard in an independent capacity, whether in support of, or in opposition to submissions made by the relator's counsel. The Court arrived at this conclusion by reference to precedent, but also to the Attorney-General's ability to control the action.[30]

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25 *Adams v Adams (Attorney-General intervening)* [1971] P 188; [1970] 3 WLR 934; [1970] 3 All ER 572; *Rio Tinto Zinc Corporation v Westinghouse Electrical Corporation* [1978] AC 547. See Edwards, above n 22, 153–6.

26 As, for example, in *Attorney-General ex rel McWhirter v Independent Broadcasting Authority* [1973] 2 WLR 344. See Edwards, above n 22, 156–8. Amicus appearances of the Attorney-General are more established in the United States: S Krislov, 'The role of the Attorney-General as Amicus Curiae' in L Huston et al (ed), *Roles of the Attorney General of the United States* (1968).

27 *Attorney-General (Kew); Ex rel Duncan v Andrews* (1979) 145 CLR 573, 582.

28 Only Queensland has enacted legislation regulating the fiat process: *Attorney-General Act* 1999 (Qld); and *Attorney-General Regulations* 2000 (Qld).

29 The peculiar facts of the *Bishops Case* are addressed below, at part IV.A.

30 Hayne J noted that, in the absence of other parties, the Attorney-General's intervention against the relator would not give rise to a Chapter III 'matter': *Bishops Case* (2002) 209 CLR 372, 474. But note the dissent by Kirby J, 452–3.

D *The Attorney-General's Monopoly Over Public Interest Litigation Broken*

The Attorney-General's monopoly over the enforcement of public rights has now broken down. This has occurred through the broadening of standing requirements under the general law, a movement which is also reflected in federal constitutional law (part II.D.1). One of the driving forces in the abandonment of the traditional standing rule has been the judicial mistrust of the political character of the Attorney-General's office (part II.D.2).

1 *Broadening of the Rules of Standing*

A variety of legal developments have contributed to the broadening of standing rules for the enforcement of public rights; only some of these are noted here.[31] One important stream of doctrinal reform ran from the public nuisance case of *Boyce v Paddington Borough Council* (*the* '*Boyce Case*'). The *Boyce Case* established that a private applicant had standing to seek a declaration or an injunction in relation to a public right if interference with the public right (i) also involved an interference with the applicant's private right; or (ii) caused the applicant to suffer 'special damage peculiar to himself'.[32] The 'special damage' criterion confirmed a series of statements in earlier cases on statutory duties,[33] and marked a further inroad by equity in the enforcement of public law rights. During most of the twentieth century the 'special damage' criterion was strongly criticised for its narrowness.[34]

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31 From a voluminous literature, see: Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies* 78 (1996); Justice K E Lindgren, 'Standing and the State' in Paul Finn (ed), *Essays on Law and Government Volume 2: The Citizen and the State in the Courts* (1996); Peter Cane, 'Open Standing and the Role of Courts in a Democratic Society' (1999) 20 *Singapore Law Review* 23; and Elizabeth C Fisher and Jeremy Kirk, 'Still Standing: An Argument for Open Standing in Australia and England' (1997) 71 *Australian Law Journal* 370.

32 *Boyce Case* [1903] 1 Ch 109, 114. The inconsistency between the statement of principle in *Gouriet's* Case and the 'special interest' criterion which eventually grew out of the *Boyce Case* was noted in *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672, 681 and the *Bateman's Bay Case* (1998) 194 CLR 247, 261–2 (Gaudron, Gummow and Kirby J).

33 These were cases in breach of statutory duty, ultra vires cases against statutory corporations and public nuisance cases: the *Bateman's Bay Case* (1998) 194 CLR 247, 264 (Gaudron, Gummow and Kirby J); and Paul D Finn, 'A Road Not Taken: The Boyce Plaintiff and Lord Cairns' Act (Pts I & II)' (1983) 57 *Australian Law Journal* 493 & 571, 498–503.

34 *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 530–1; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 276, 61, 69; *Wentworth v*

Eventually, in the *Australian Conservation Foundation Inc v Commonwealth* (the *'Australian Conservation Foundation Case'*) and *Onus v Alcoa of Australia Ltd*, the High Court restated the standing rule as a requirement that the applicant demonstrate a 'special interest' in the subject matter of the litigation.[35] This was a much more liberal rule. Rather than providing a positive account of persons satisfying the special interest criterion, the courts have gradually established a catalogue of persons and interests to whom they would not give standing.[36] On the common law side, tests for standing in actions seeking prerogative remedies are now also broadly conceived. There is no unified picture of the law in this area. However, it may be said that standing for the prerogative remedies is at least as generous as standing under the 'special interest' formulae and broad enough, in some cases, to grant standing to 'strangers' to the action.[37]

Within federal constitutional law, the High Court has also taken a more generous view of standing.[38] Standing to bring an action in the original jurisdiction of the

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Woollahra Municipal Council (1982) 149 CLR 672, 680; the *Bateman's Bay Case* (1998) 194 CLR 247, 256 (Gaudron, Gummow and Kirby J).

35 *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 524, 530–1; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 35–6. See also *Shop Distributive and Allied Employés Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552, 558; the *Bateman's Bay Case* (1998) 194 CLR 247, 267-8 (Gaudron, Gummow and Kirby J) and 283-4 (McHugh J); and the *Truth About Motorways Case* (2000) 200 CLR 591, 599 (Gleeson CJ and McHugh J), 626 (Gummow J). The public interest litigant may, in certain circumstances also enjoy a favourable exercise of the judicial discretion as to the award of costs: see *Oshlack v Richmond River Council* (1998) 193 CLR 72.

36 Chief amongst those refused are persons with a mere intellectual, emotional aesthetic or psychological concern in the subject matter of the litigation. For an analysis of a wide range of pre–2000 cases, see Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) 520–36.

37 *Bateman's Bay Case* (1998) 194 CLR 247, 263 (Gaudron, Gummow and Kirby J) and 275 (McHugh J); the *Truth About Motorways Case* (2000) 200 CLR 591,627–8 (Gummow J) and 652–3 (Kirby J). The legal historical foundation for this claim is nevertheless a matter of controversy: see below, part IV.D.2.

38 Simon Evans and Stephen Donaghue, 'Standing to Raise Constitutional Issues in Australia' in G Moens and R Biffot (eds), *The Convergence of Legal Systems in the 21st Century: An Australian Approach* (2002); Henry Burmester, 'Limitations on Federal Adjudication' in B Opeskin and F Wheeler (eds), *The Australian Federal Judicial System* (2000); Henry Burmester, 'Locus Standi in Constitutional Litigation' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992); P W Johnston, 'Government Standing under the Constitution' in L A Stein

High Court is governed by the concept of a 'matter' in respect of which jurisdiction is conferred.[39] Where federal jurisdiction is conferred on a court by legislation, the concept of matter is broad enough to allow the Commonwealth Parliament to confer standing on any person.[40] Standing per se will rarely be a problem in a citizen suit. Although there are debates about whether it is preferable for constitutional standing in public interest suits to be narrower or broader than in non–constitutional suits,[41] the High Court has suggested that standing in constitutional cases should be at least as broad as in non–constitutional cases.[42] By the end of the twentieth century, Australian legislatures had also begun to regularly enact legislation granting standing to ministers, regulatory authorities and other public office–holders in public interest suits. This has fractured the control of the Attorney-General over public interest suits brought by government. More importantly, some statutes now contain broad standing provisions which allow persons 'aggrieved' or 'any person'[43] to sue.

Taken together, these movements have generated a trend towards 'open standing' in public law and have broken the Attorney-General's stranglehold over the enforcement of public rights through his or her power to grant or refuse a fiat. Selway records that in the period 1992–2002, 37 applications for a grant of fiat were

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(ed), *Locus Standi* (1979); G D S Taylor, 'Standing to Challenge the Constitutionality of Legislation' in L A Stein (ed), *Locus Standi* (1979).

39 Constitution, ss 75 and 76; *Croome v Tasmania* (1997) 191 CLR 119, 132–3; *Abebe v The Commonwealth* (1999) 197 CLR 510, 528 (Gleeson CJ and McHugh J); *Bateman's Bay Case* (1998) 194 CLR 247, 261–2 (Gaudron, Gummow and Kirby J); and the *Truth About Motorways Case* (2000) 200 CLR 591, 611 (Gaudron J), 629–637 (Gummow J).

40 *Truth About Motorways Case* (2000) 200 CLR 591.

41 See: S Evans and S Donaghue, above n 38, 99–103, discussing opposing viewpoints of Henry Burmester, in Lee and Winterton (eds), above n 37; and P Cane, above n 31.

42 *Bateman's Bay Case*(1998) 194 CLR 247, 267 (Gaudron, Gummow and Kirby J). Compare also less express comments made in the *Truth About Motorways Case*, (2000) 200 CLR 591, 631, 637 (Gummow J), 660 (Hayne J) and 667–8 (Callinan J) (no requirement of reciprocity or mutuality of right and liability between applicant and respondent).

43 See respectively: *Administrative Decisions Judicial Review Act* 1977 (Cth), s 5(1); and *Trade Practices Act* 1974 (Cth), s 80(1), the constitutional validity of which was upheld in the *Truth About Motorways Case* (2000) 200 CLR 591.

made, but only 8 of these were granted.[44] Nevertheless, the Attorney-General is still an important actor in the enforcement of public law rights. The Attorney-General may initiate proceedings in an ex officio capacity. Furthermore, an individual litigant who can obtain the assistance of an Attorney-General gains an advantage through the political recognition of the importance of the case.

2 *Doctrinal Impact of the Attorney-General's Politicisation*

One of the forces behind the liberalisation of the public law standing rule has been the judicial mistrust of the Attorney-General's ability to act as guardian of the public interest while under the influence of party politics. The current Commonwealth Attorney-General has made it very clear that Australian Attorneys–General are political actors:[45]

> …Australian Attorneys–General are elected members of Parliament. They are not necessarily lawyers, they are not necessarily in Cabinet, and invariably they administer departments. They are politicians and members of a Government, with the usual responsibilities and constraints that this entails. Australian Attorneys–General are not, and cannot be, independent of political imperatives. They are not just legal advisers to government: they are politicians, answerable to their party colleagues, Parliament and the electorate.

The involvement of both the Commonwealth and the Queensland Attorney-General in several political controversies in the period 2000–2002, have placed statements such as this under the microscope. Little would be gained by repeating the analyses of these controversies.[46] For present purposes, it is important to note those political characteristics of the office which operates as factors in the High Court's thinking

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44 Bradley Selway, 'The Different Role of An Australian Attorney-General' (paper presented at the conference *Reflections on the Role of the Attorney General,* Melbourne University Law School, 27 September 2002).

45 Hon Mr Daryl Williams QC, 'The Role of an Australian Attorney-General: Antipodean Developments from British Foundations' (Paper presented at the Anglo-Australian Lawyers Society, London, 9 May 2002), paras 85–6.

46 From a voluminous literature, see: Len King, 'The Attorney-General, Politics and the Judiciary' (2000) 74 *Australian Law Journal* 444; Gerard Carney, 'Comment – The Role of the Attorney-General' (2002) 9 *Bond Law Review* 1; and papers presented at the conference *Reflections on the Role of the Attorney-General*, University of Melbourne, 27 September 2002. The Commonwealth Attorney-General has put his position several times: see above n 44, and Daryl Williams, 'The Role of the Attorney-General', (2002) 13(4) *Public Law Review* 252–62.

on (i) the liberalisation of standing requirements; and (ii) the possibility of federal restrictions on the role of the Attorneys–General in the administration of justice.[47]

In English legal and parliamentary practice the Attorney-General and the Solicitor–General are members of Parliament and the executive. They are known, respectively, as the First and Second 'Law Officers of the Crown'. By convention, neither of the Law Officers are members of Cabinet. This measure was designed to insulate the Attorney-General from political pressures in the execution of his legal duties.[48] The Australian colonies initially modeled both offices on the English practice. During the 'Mercantile Bank Affair' of 1893,[49] both the Attorney-General and the Solicitor–General of the colony of Victoria were members of Parliament. In that affair Solicitor–General Isaac Isaacs preferred to resign rather than alter his view on the appropriate performance of his legal duties to conform with that of his more politically–oriented senior colleague, the Attorney-General. In 1977, the Commonwealth Attorney-General Robert Ellicott QC also resigned in protest over what he regarded as an attempt by Cabinet to control the exercise of his discretion in criminal proceedings against members of the previous government.[50]

It is nevertheless true that post–federation Australian practice discloses no close following of the British tradition. Upon federation, the office of Commonwealth Attorney-General was already a much more political institution. The first Commonwealth Attorney-General, Alfred Deakin, was a member of the Barton Cabinet. Between 1914 and 1921, William Morris Hughes served as Attorney-General *and* Prime Minister![51] Another important difference in the English and

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47 See below, part IV.C.2 (the problem of strategic enforcement of the law).

48 See generally: Edwards above n 11; Edwards, above n 22; D Woodhouse, 'The Attorney General' (1997) 50 *Parliamentary Affairs* 98; and Neil Walker, 'The Antinomies of the Law Officers' in M Sunkin and S Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (1999).

49 This controversy arose from the resignation of the Solicitor–General for Victoria (Isaac Isaacs) over his insistence that a well–known businessman and politician be prosecuted in relation to the collapse of a bank. The Attorney-General held a contrary view. Isaacs resigned from his office, and was returned to Parliament at the next election as an independent: see R Plehwe, 'The Attorney-General and Cabinet: Some Australian Precedents' (1980) 11 *Federal Law Review* 1, 3–7; and Edwards, above n 22, 373–9.

50 Edwards, above n 22, 379–88; and Plehwe, ibid, 12–17. The litigation resulted in *Sankey v Whitlam* (1978) 142 CLR 1. See also Plehwe's account of the 'John Brown Case' (pp 7–11).

51 'Billy' Hughes served as Attorney-General four times between 1908 and 1941: Commonwealth of Australia, Attorney-General's Department, *100 Years: Achieving a*

Australian practice was the use of the Attorney-General's office at both the State and the Commonwealth level to provide legal services to government as a whole, rather than just to the core of the executive.[52] Reinforcing this position, many Australian statutes nominate the Attorney-General as the appropriate applicant or respondent in actions across the breadth of government.[53] Statutory descriptions of the functions of the Attorney-General and the Solicitor–General in at least three jurisdictions are very broad.[54]

The High Court has noted the differences between the English and the Australian offices, and has confirmed the political character of the Australian office. It has concluded that it is unrealistic for the citizen to rely upon the grant of the Attorney-General's fiat in actions against entities for the administration of which a ministerial colleague is responsible.[55] The biggest step in this direction was taken in the *Bateman's Bay Case*. In that case, competitors to a statutory corporation formed under State law sought the State Attorney-General's fiat to restrain ultra vires activity by the corporation. The fiat was refused. The High Court ruled that the competitors had a 'sufficient special interest' to sue.[56] Standing was therefore determined on the basis of the rule in *Onus v Alcoa* (1981). In obiter dicta, three members of a five member Court went beyond this rule to speak of the special case of citizen standing in suits against statutory corporations. Referring to the politicisation of the Attorney-General's office, these judges noted that 'reasons of history and the exigencies of present times' require the special interest criterion to be 'construed as an enabling, not a restrictive, procedural stipulation'.[57] This approach informed speculation about a new standing rule:[58]

Just and Secure Society – Attorney-General's Department 1901-2001 (2001) 21, 42–3, 53–4, 171.

52 See B Selway, above n 44. See also N Walker, above n 48, 143–4.

53 For example, *Judiciary Act* 1903 (Cth), ss 61 and 69. See also Selway, ibid.

54 *Attorney-General Act* 199 (Qld), ss 7–9; *Attorney-General & Solicitor–General Act* 1972 (Vic); and *Supreme Court Act* 1972 (WA), s 154(2).

55 *Victoria v The Commonwealth and Hayden* ('the *AAP Case*') (1975) 134 CLR 338, 383; *Bateman's Bay Case* (1998) 194 CLR 247, 262 (Gaudron, Gummow and Kirby J), 279 (McHugh J) and 284 (Hayne J); *Truth About Motorways Case* (2000) 200 CLR 591, 668–9 (Callinan J). See also Geoffrey Sawer, *Australian Federalism in the Courts* (1967) 93–4.

56 *Bateman's Bay Case* (1998) 194 CLR 247, 267-8 (Gaudron, Gummow and Kirby JJ), 283–4 (McHugh J), 284 (Hayne J).

57 Ibid 267 (Gaudron, Gummow and Kirby JJ).

58 Ibid 263 (Gaudron, Gummow and Kirby JJ).

> In a case where the plaintiff has not sought or has been refused the Attorney-General's fiat, it may well be appropriate to dispose of any question of standing to seek injunctive or other equitable relief by asking whether the proceedings should be dismissed because the right or interest of the plaintiff was insufficient to support a justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process. The plaintiff would be at peril of an adverse costs order if the action failed. A suit might properly be mounted in this way, but equitable relief denied on discretionary grounds.

This is a proposal in the direction of open standing under which the applicant is given access to the courts, assessing for himself or herself the risk of failure and an adverse costs order. The exceptions to the standing rule are relatively marginal. Although the statements are obiter dicta, their jurisprudential direction has, so far, not been contradicted.[59]

Gaudron, Gummow and Kirby JJ reviewed older authorities where courts were prepared to leave unremedied the ultra vires actions of a statutory authority because the Attorney-General had not sued, and stated that '[s]uch a state of affairs can have little to recommend it'.[60] The judges warned that too precise a formula for the applicant's special interest may unduly constrict the availability of equitable remedies to support the 'public interest in due administration which enlivens equitable intervention in public law'.[61] References to this conception of the public interest abound in the judgments. The judges spoke of 'the public interest in due administration of public bodies with recourse to public revenues' and 'the observance by … statutory authorities, particularly those with recourse to public revenues, of the limitations upon their activities which the legislature has imposed'.[62]

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59 *Truth About Motorways Case* (2000) 200 CLR 591. This case dealt with a different issue. It held that a Commonwealth statute conferring standing on 'any person' was consistent with the concept of federal judicial power under Chapter III of the Constitution.

60 *Bateman's Bay Case* (1998) 194 CLR 247, 260 (Gaudron, Gummow and Kirby JJ commenting on decisions such as *Helicopter Utilities Pty Ltd v Australian National Airlines Commission* [1962] NSWR 747). But cf McHugh J at 276.

61 *Bateman's Bay Case* (1998) 194 CLR 247, 265.

62 Ibid 263–4 and 267. See also 284 (McHugh J). It is unclear from any of these statements whether the apparatus of public administration targeted as a respondent to the public interest suit is to be defined by reference to *institutional* or *functional* criteria. This will no doubt arise as a question for future consideration, as modern executive activity comes to be harder to identify by reference to its legal character alone.

The judicial acknowledgement of the political character of the Attorney-General is therefore justifiably regarded as a major force in the development of a new rule of public interest standing which allows the citizen to enforce public rights by circumventing the Attorney-General. In the third part of this paper, it will be argued that this fact forms an important force behind the *Bishops Case.* [63]

III THE PRAGMATIC ACCOMMODATION OF FEDERALISM: 1908–2002

Up until the *Bishops Case*, the main impact of federalism on the Attorney-General's role in public interest litigation was the division of the responsibility for the people of the new Commonwealth. Each polity in the federation had its own Attorney-General, but it was unclear which Attorney-General was the appropriate Attorney-General to pursue litigation in respect of a given right or interest described as 'public'. Some rights had to be enforced against Commonwealth law; others against State law. The infringement of some public rights would affect all citizens of the Commonwealth; the infringement of other rights would only affect the citizens of certain States or Territories, or even smaller sections of the population within a particular polity. The early High Court was therefore faced with the problem of determining whose 'public interests' each Attorney-General could vindicate and under what circumstances. The citizen's reliance on the Attorney-General to enforce rights, and the political character of the decision to grant a fiat, lent the question great practical significance.

The federal division of responsibility for the enforcement of public rights first fell to be decided in the *Union Label Case* (1908).[64] In that case, the New South Wales Attorney-General, at the relation of several New South Wales brewing companies, sued among others, the Commonwealth Registrar of Trade Marks. The Attorney-General succeeded in a claim that parts of a Commonwealth intellectual property statute were invalid and that Commonwealth executive action pursuant to the statute was invalid. A majority of the Court dismissed an objection to the NSW Attorney-General's competency to pursue the action. O'Connor J acknowledged the novelty of the question:[65]

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63 See below, part IV.C.2.

64 (1908) 6 CLR 469.

65 Ibid 552. For similar comments on the need for a 'federal' adaptation, see *A-G (Vic) ex rel Dale v Commonwealth* (*the* '*Pharmaceutical Benefits Case*') (1945) 71 CLR 237, 272; *Tasmania v Victoria* (*the* '*Potato Case*') (1935) 52 CLR 157, 186.

> In a unitary form of government, as there is only one community and one public which the Attorney-General represents, the question which has now been raised cannot arise. It is impossible, therefore, that there can be any decision either in England or in any of the Australian Colonies before Federation exactly in point. But it seems to me that in the working out of the federal system established by the Australian Constitution an extension of the principle is essential. The Constitution recognizes that in respect of the exercise of State powers each State is under the Crown an independent and autonomous community. Similarly the States must recognize that in respect of the exercise of Commonwealth powers all State boundaries disappear and there is but one community, the people of the Commonwealth. The proper representative in Court of each of these communities is its Attorney-General.

With the exception of Higgins J, all judges held the NSW Attorney-General to be a competent plaintiff to challenge the validity of a Commonwealth law. Nevertheless, in this, and subsequent decisions over the next few decades, different theories would be advanced regarding the Attorney-General's standing in respect of a particular 'community'. The overall drift of the jurisprudence was towards a liberal standing rule which permitted the Attorneys–General standing whenever they sought to enforce compliance with the Constitution (part III.A.1). Rather than ensnare the Attorneys–General in the federal division of powers, the Court adopted a pragmatic approach which avoided some of the difficulties which had already emerged in the rules of intergovernmental litigation in both Australian and United States jurisprudence (part III.A.2). These judicial developments were complemented by legislative action which granted the Attorneys–General statutory rights of removal of causes to the High Court and intervention in proceedings raising constitutional matters (part III.B).

A *A Pragmatic Jurisprudence of Standing*

But for the *Bishops Case*, the examination of the Attorney-General's standing to enforce public rights would be an exercise in pure legal history. As noted above, the High Court has now moved to a position where it assimilates the question of an applicant's standing in constitutional litigation with the question whether there is a 'matter' — as defined under Chapter III of the Constitution — attracting the exercise of federal jurisdiction.[66] Following the *Bateman's Bay Case*, standing in non–constitutional matters is also very broad.[67] Consistent with this approach, it would seem unlikely that the identification of an Attorney-General with a particular polity would deprive that Attorney-General of standing in respect of the

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66 See above n 39.

67 (1998) 194 CLR 247; see above, part II.D.1.

enforcement of any public right. If the activities of a Victorian statutory authority were affecting New South Wales citizens, there would be no reason to suppose that the New South Wales Attorney-General could not commence proceedings against the Victorian authority to vindicate the interests of the people of New South Wales. Standing in public law does not, of course, guarantee the grant of a remedy; the unmeritorious claim can always be weeded out through the refusal of a remedy and a costs order. On a practical level, the question would be unlikely to arise due to the citizen's enhanced ability to pursue his or her own rights, without the assistance of the Attorney-General.[68] The *Bishops Case* appears to have introduced certain federal limitations into the standing of the Attorneys–General that are not present in the earlier jurisprudence.

1 *Movement to a Standing Test Based on the Presence of a Constitutional Matter*[69]

A federal system such as Australia relies on the use of litigation to determine the precise constitutional allocation of legislative responsibilities between the federal and the regional polities, and to provide the backdrop for political agreements between the polities. The grant of original jurisdiction to the High Court under section 75 of the Constitution assumes intergovernmental litigation. As the legal representative of each polity's executive, the Attorney-General was the obvious person to represent his or her respective polity in intergovernmental litigation. This representational role was recognised early in the history of the federation through sections 60 and 61 of the *Judiciary Act* (1903).[70] In the first four decades of the High Court, three discrete theoretical bases for the Attorney-General's standing were advanced. These were developed in the context of a State Attorney-General's standing to challenge Commonwealth legislative or executive action:

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68 Ibid.

69 A more comprehensive exposition of the various dicta may be found in P W Johnston, above n 38, 192–8; Evans and Donaghue, above n 38, 59–62, 78–81; and Stephen J's review of the authorities in *Victoria v Commonwealth* (the '*AAP Case*') (1975) 134 CLR 338, 388–91.

70 Section 61 of the *Judiciary Act* 1903 (Cth) states: 'Suits on behalf of the Commonwealth may be brought in the name of the Commonwealth by the Attorney-General or by any person appointed by him or her in that behalf.' Section 62 states: 'Suits on behalf of a State may be brought in the name of the State by the Attorney-General of the State, or by any person appointed by him or her in that behalf.' See also *Judiciary Act* s 69 (indictments) and s 40 (removal of suits to the High Court, discussed below, part III.B).

i) A State Attorney-General has standing to challenge Commonwealth legislation where there is injury to the citizens of his State.[71]
ii) A State Attorney-General has standing to sue where the Commonwealth usurps the functions of the States or a field of State legislative power.[72]
iii) A State Attorney-General has standing to challenge the validity of Commonwealth legislation which extends to, and operates within, his State.[73]

The third position was the least restrictive, and ultimately won out. By the time of *Attorney-General (Vic) ex rel Dale v Commonwealth* (the '*Pharmaceutical Benefits Case*'), Dixon J was able to say that[74]

> [T]he settled doctrine of this Court was accurately expressed by *Gavan Duffy* C.J., *Evatt* and *McTiernan* JJ. in *Attorney-General for Victoria v The Commonwealth* [the '*Clothing Factory Case*' (1935) 52 CLR 533, 556] when they said… "the Attorney-General of a State of the Commonwealth has a sufficient title to invoke the provision of the Constitution for the purpose of challenging the validity of Commonwealth legislation which extends to, and operates within, the State whose interests he represents."

The movement away from the tests based on injury to the State's public and 'invasion' of legislative spheres also became evident in inter-State litigation. In the *Potato Case*, the Attorney-General of Tasmania was granted standing to sue Victoria in a case where Victorian executive action contravened section 92 of the Constitution.[75] The reasoning in this case naturally placed more importance on the nature of the constitutional protection which the Tasmanian Attorney-General sought to obtain.

A similar approach was evident in later cases which considered the Commonwealth Attorney-General's standing in litigation challenging Commonwealth or State laws.

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71 *Union Label Case* (1908) 6 CLR 469, 499–500, 550–3, 557; *A-G* (*Vic*) *v Commonwealth* (*the* '*Clothing Factory Case*') (1935) 52 CLR 533, 561; *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 272, 278–9.

72 *Union Label Case*, (1908) 6 CLR 469, 520, 557–8; t*he Clothing Factory Case* (1935) 52 CLR 533, 564; the *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 246–7, 272. Cases prior to *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (the '*Engineers Case*') (1920) 28 CLR 129 were no doubt affected by the doctrine of 'reserve State powers'.

73 *Clothing Factory Case* (1935) 52 CLR 533, 556, 561; the *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 272–3.

74 *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 272–3.

75 (1935) 52 CLR 157, 168, 171, 188.

In these cases, standing was based on the fact that the law to be challenged affected 'Commonwealth interests' or 'the public generally', or on the fact that the Attorney-General's suit was needed to vindicate Commonwealth laws, the Constitution or the authority of the High Court.[76] By the time of the *AAP Case* and the *DOGS Case*,[77] Gibbs and Mason JJ had taken the third position one step further:

iv) A State or Commonwealth Attorney-General has standing whenever he or she seeks to enforce compliance with the Constitution.

In the *DOGS Case*, Gibbs J stated:[78]

> In my opinion even where no question arises as to the limits inter se of the powers of the Commonwealth and the State, the Attorney-General of a State may sue to compel the Commonwealth to observe the fundamental law of the Constitution, which the citizens of any State has an interest to maintain, although it may not be such a special interest as would enable them as individuals to bring the suit.

Such an approach would grant an Attorney-General standing in both Commonwealth–State and State–State litigation. It would also grant standing to an Attorney-General in respect of both legislative and executive action alleged to be unconstitutional. In effect, Gibbs and Mason JJ had moved quite close to the position expressed in later public interest standing cases such as *Croome v Tasmania* (1997), *Bateman's Bay* (1998) and *Truth About Motorways* (2000) — namely, that *any person* will be given standing if he or she can show that there is a 'matter' attracting federal jurisdiction.[79]

The High Court's pragmatic and liberal approach to the Attorney-General's standing is further illustrated by the lack of concern about the appearance of the Attorney-

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76 *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *A-G (Cth) v T & G Mutual Life Society Ltd* (1978) 144 CLR 161, 166, 181–2, 182–3. See discussion in Evans and Donaghue, above n 38, 61–2.

77 *AAP Case* (1975) 134 CLR 338; *A-G (Vic) ex rel Black v Commonwealth (*the '*DOGS Case*') (1981) 146 CLR 559.

78 (1981) 146 CLR 559, 589, citing the *AAP Case* (1975) 134 CLR 338, 381 (Gibbs J) 401–2 (Mason J), distinguishing 387–80 (Stephen J), 424–5 (Murphy J).

79 *Croome v Tasmania* (1997) 191 CLR 119, 132–3; *Bateman's Bay Case* (1998) 94 CLR 247, 261 (Gaudron, Gummow and Kirby JJ); *Truth About Motorways Case* (2000) 200 CLR 591, 627–8 (Gummow J), 652–3 (Kirby J). See above n 38 and accompanying text.

General of a particular polity as a separate named party alongside the polity itself.[80] In the *AAP Case,* only some of the judges thought it necessary to comment on such a dual appearance.[81] Selway notes that in more recent cases the Court might even *require* a separate appearance by the polity, or some part of its executive, and the Attorney-General of the polity.[82]

2 *Federal Paths Not Taken*

The characterisation of the jurisprudence on the standing of Attorneys–General in constitutional litigation as 'liberal' and 'pragmatic' is further reinforced by considering some of the paths not taken by the High Court. Three such paths may be noted.

First, the High Court did not attribute a restrictive legal consequence to the distinction between the Attorney-General's representation of the State's interests and the interests of its people. In *Massachusetts v Mellon*,[83] the United States Supreme Court held that the State of Massachusetts did not have standing to challenge a federal law where the State sued in its capacity as *parens patriae*. The Supreme Court stated that:[84]

> …the citizens of Massachusetts are also citizens of the United States. While the State, under some circumstances, may sue [as *parens patriae*] for the protection of its citizens…, it is no part of its duty or power to enforce the their rights in respect of their relations with the Federal Government. In that field, it is the United States, and not the State, which represents them as *parens patriae,* when such representation becomes appropriate; and to the former and not to the latter, they must look for such protective measures as flow from that status.

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80 Some examples of such dual appearances: *Commonwealth v Australian Shipping Board* (1926) 39 CLR 1; *Potato Case*; *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; *AAP Case* (1975) 134 CLR 338; *Commonwealth v Queensland* (the '*Queen of Queensland Case*') (1975) 134 CLR 298; *R v Hughes* (2000) 202 CLR 535 (appearance of the Commonwealth and the Commonwealth Director of Public Prosecutions).

81 (1975) 134 CLR 338, 366 (Barwick CJ), 383 (Gibbs J), 387–91 (Stephen J). Stephen J gave much emphasis to the procedural separation of Victoria and its Attorney-General (see below n 86). Barwick CJ and Gibbs J simply noted that they thought the State the more appropriate plaintiff. In *Commonwealth v Australian Shipping Board* (1926) 39 CLR 1, 12–3, Higgins J commented adversely on the practice.

82 See Selway, above n 44.

83 *Massachusetts v Mellon* 262 US 447 (1923).

84 Ibid 485–6 (references omitted). The challenge was to a federal maternity statute which provided aid to pregnant women and their newborn children.

The United States Supreme Court has maintained this approach to State suits to enforce federal laws.[85] On several occasions, the High Court rejected this line of authority.[86] Where the High Court has drawn a distinction between the Attorney-General's standing as representative of the State executive and standing as representative of the State's people, it has not done so to constrict the basis of standing. Rather, it has done so to provide the State Attorney-General with an additional basis of standing.[87]

Secondly, the High Court did not seek to resolve the roles of the Attorneys–General in a federal system by reference to the divisibility of the Crown. For the first three decades of its life, the High Court struggled to find a legal account of intergovernmental relations within Australia, and an account of relations between the nations of the British Commonwealth, which could be reconciled with the traditional doctrine of the 'unity and indivisibility' of the Crown.[88] The High Court

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85 See: *South Carolina v Katzenbach,* 383 US 310, 324 (1966); Richard H Fallon, Daniel J Meltzer and David L Shapiro, *Hart and Wechslers The Federal Courts and The Federal System* (4th ed, 1996), 322–3; Erwin Chemerinsky, *Federal Jurisdiction* (2nd ed, 1994) §2.3; and Charles A Wright, *Law of Federal Courts* (4th ed, 1994), §14 and §109 (p 813). See also Robert Jacobs, 'Standing Of States To Represent The Interests of Their Citizens In Federal Court' (1971) 21 *American University Law Review* 224 discussing the dissent of Douglas J in the controversial Vietnam War case of *Massacusetts v Laird* 400 US 886 (1970). For many years, the distinction between State interest per se and State interest qua *parens patriae* of its citizens has also bedeviled the standing of States in inter–State litigation: see Fallon et al, above, 316–322.

86 *Pharmaceutical Benefits Case* (1945) 71 CLR 237, 248, 266; *AAP Case* (1975) 134 CLR 338, 382–3, 388–89. Higgins J was the only judge to advance a position similar to that of *Massachusetts v Mellon*: see the *Union Label Case* (1908) 6 CLR 469, 597–8.

87 In the *AAP Case*, four judges dismissed a challenge by Victoria and the Victorian Attorney-General to a federal appropriation statute. Stephen J was the only member of this majority to find against both plaintiffs on the ground that they had no standing. He explored separately the Attorney-General's standing as representative of Victoria and as guardian of the public interest of the Victorian people before rejecting both bases. The judgment implies that one of these bases would have been sufficient for standing: *Victoria v Commonwealth* (1975) 134 CLR 338, 387–91.

88 Compare: D P O'Connell, 'The Crown in the British Commonwealth' (1957) 6 *International and Comparative Law Quarterly* 103; *Sue v Hill* (1999) 199 CLR 462, 499-502 (Gleeson CJ, Gummow and Hayne JJ); Herbert Evatt, *The Royal Prerogative* (1987) Ch 9; and Michael Stokes, 'Are There Separate State Crowns?' (1998) 20 *Sydney Law Review* 127.

commenced with the view that the Crown was divisible;[89] it returned to the indivisibility theory in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (the '*Engineers Case*') (1920)[90] and then later rejected it.[91] Eventually, Dixon J's theory of federal government, founded on the 'ordinary conceptions of life' prevailed. Dixon J treated the States and the Commonwealth as 'organizations or institutions of government', as 'politically organised bodies having mutual legal relations'.[92] Even though, in the language of the time, the Attorneys–General were the legal representatives of 'their respective Crowns', there was no attempt to view the standing of the Attorneys–General through this analytical framework. The Court simply gave the Attorneys–General standing on any of the three bases (i)–(iii) mentioned above (part III.A.1).

Thirdly, the High Court never explicitly grounded the Commonwealth Attorney-General's standing to represent the people of the Commonwealth in section 61 of the Constitution. The power conferred upon the Commonwealth executive under section 61 of the Constitution is limited by reference to subject matters which could have been the subject of a valid Commonwealth law.[93] The decision in *R v Hughes* (2000) has firmly reminded us that as a member of the Commonwealth executive, the Commonwealth Attorney-General acts in exercise of the section 61 power.[94] *R v Hughes* and its companion decisions[95] demonstrate the High Court's new–found enthusiasm for policing the federal limits of Commonwealth legislative and

89 *D'Emden v Pedder* (1904) 1 CLR 91, 109–11; *Deakin v Webb* (1904) 1 CLR 585; *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees' Association* (the '*Railway Servants Case*') (1906) 4 CLR 488, 536–8; *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1120–32.

90 *Engineers Case* (1920) 28 CLR 129, 152–3, 159; *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421.

91 *Minister for Works (WA) v Gulson* (1944) 69 CLR 338, 350–1, 357. See also *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, 123.

92 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82; and *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 373.

93 *Johnson v Kent* (1975) 132 CLR 164; *Davis v Commonwealth* (1988) 166 CLR 79. See also *Ruddock v Vadarlis* (2001) 183 ALR 1, 48 and 52 (French J).

94 *R v Hughes* (2000) 202 CLR 535, 554.

95 *Gould v Brown* (1998) 193 CLR 346; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. See generally: Dennis Rose, 'The Bizarre Destruction of Cross-Vesting' in A Stone and G Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000); Graeme Hill, 'The Demise of Cross–Vesting' (1999) 27 *Federal Law Review* 547; and Leslie Zines, 'The Present State of Constitutional Interpretation' in A Stone & G Williams (eds), *The High Court at the Crossroads* (2000).

executive powers in schemes for intergovernmental co–operation. If the Court seeks to enforce a stricter federal division of the roles of the respective Attorneys-General, it might attempt to expressly peg back the Commonwealth Attorney's functions in public interest litigation to a stricter conception of the Commonwealth's legislative (and hence executive) powers.[96] Nevertheless, as a matter of legal history, it can safely be said that during the first century of its existence, the Court did not feel the need to travel down this path. Well before the firm judicial recognition of the national implied power,[97] the Court was content to allow the Commonwealth Attorney-General to represent the 'community' represented by the Commonwealth without reference to the breadth of the executive power.

B *Intervention and Removal Rights*

The Court's liberal approach to the standing of the Attorneys–General was complemented by federal legislation creating rights of removal and intervention. Section 40(1) of the *Judiciary Act* allows the Attorneys–General to remove to the High Court a 'cause or part of a cause arising under the Constitution or involving its interpretation that is at any time pending in a federal court'. The order will be made 'as of course'. The effect of an earlier version of this provision was explained in *Ex parte Walsh and Johnson* (1925):[98]

> If a party applies, he must show sufficient cause, and must submit to terms if the Court thinks fit. But an Attorney-General — of the Commonwealth, if he thinks Commonwealth interests involved, or of a State, if he thinks State interests involved — may obtain the order as of course. Parliament recognising that, if the Commonwealth or a State desires the removal, that is in itself sufficient guarantee of materiality in the first instance.

Under section 40(2), the Commonwealth Attorney-General may apply to remove to the High Court a cause pending in a court exercising federal jurisdiction.

Until 1976, the right of the Attorneys–General to intervene in litigation before the High Court was subject to the discretion of the Court. Leave to intervene was often

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96 Note Gleeson CJ's reference to *R v Hughes* (2000) 202 CLR 535, in the *Bishops Case* (2002) 209 CLR 372, 396.

97 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187–9; and *Davis v Commonwealth* (1988) 166 CLR 79. See generally Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 297–303.

98 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36, 73 (Isaacs J).

refused.[99] In *Australian Railways Union v Victorian Railways Commissioners* (the '*Australian Railways Union Case*') (1930), the Commonwealth was granted leave to intervene in litigation between the union and the Victorian Railways Commissioner. The High Court refused to allow the States of Victoria and South Australia to intervene in support of the Commonwealth's position. In refusing leave, Dixon J made the following statement of principle:[100]

> Normally parties, and parties alone, appear in litigation. But, by a very special practice, the intervention of the States and the Commonwealth as persons interested has been permitted by the discretion of the Court in matters which arise under the Constitution. The discretion to permit appearances by counsel is a very wide one; but I think we would be wise to exercise it by allowing only those to be heard who wish to maintain some particular right, power or immunity in which they are concerned, and not merely to intervene to contend for what they consider to be a desirable state of the general law under the Constitution without regard to the diminution or enlargement of the powers which as States or as Commonwealth they may exercise.

Dixon J required a particular right, duty or immunity to be asserted by the State or the Commonwealth. This statement has reappeared in several cases in interveners.[101] Dixon J's statement was repeated by the majority in the *Bishops Case* in order to support a restriction to the *standing* (rather than the intervention) of an Attorney-General. For reasons indicated below (part IV.D.1), the statement lacks persuasive authority in the modern context of standing.

The *Judiciary Act* was amended in 1976 to confer upon the State and Commonwealth Attorneys–General a statutory right to intervene in any proceeding which gave rise to a matter under the Constitution or involving its interpretation.[102] This right of intervention is supported by a mandatory procedure for the notification, to the various Attorneys–General, of cases in which such matters arise.[103] In the

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99 C Maxwell, 'In the Line of Fire: *Re McBain* and the Role of the Attorney-General as a Party' (Paper presented at the Reflections on the Role of the Attorney-General, University of Melbourne, 27 September 2002) notes that this was 'not uncommon' in cases under section 92 of the Constitution during the 1960s and 1970s.

100 (1930) 44 CLR 319, 331.

101 For example: *R v Anderson; Ex parte IPEC-Air Pty Ltd* (1965) 113 CLR 177, 182 (Kitto J); *Levy v Victoria* (1997) 189 CLR 579, 602 (Brennan CJ).

102 *Judiciary Act 1903* (Cth) s 78A. Maxwell (ibid) attributes the 1976 reform to the influence of the Attorney-General Robert Ellicott QC who, as an advocate, had experienced several refusals of intervention applications.

103 *Judiciary Act 1903* (Cth) s 78B. In 1983, the right to be notified and the right to intervene were extended to the Attorney-Generals of the two self–governing

Tasmanian Dam Case (1983),[104] the procedure was used to allow several State Attorneys–General to intervene in litigation between Tasmania and the Commonwealth, some in support of Tasmania, others in support of the Commonwealth. In the 33 constitutional law decisions handed down by the High Court between 1994 and 1997, at least one Attorney-General has exercised the right to intervene in 29 of these cases; and there was a total of 95 interventions by Attorneys–General.[105] In the case of non–governmental interests, the general law still appears to follow Dixon J's statement in the *Australian Railways Union Case*, by requiring 'a substantial affection of a person's legal interests' before intervention is granted.[106] Yet some empirical data suggests that the appearance of interveners is now more frequent.[107] Other legislation also confers statutory rights of intervention.[108]

Territories: *Judiciary Act 1903* (Cth) s 78AA. In Canada, a decision on the constitutionality of a statute issuing from a proceeding where there has been a failure to observe a similarly conceived notification procedure will render that decision a nullity: *Eaton v Brant County Board of Educations* [1997] 1 SCR 241 (SCC). See: Peter W Hogg, *Constitutional Law in Canada* (looseleaf), Vol 2, 55.3 and 56.6(a).

104 *Commonwealth v Tasmania* ('the *Tasmanian Dam Case*') (1983) 158 CLR 1.

105 Enid Campbell, 'Intervention in Constitutional Cases' (1998) 9 *Public Law Review* 255, 256.

106 (1930) 44 CLR 319, 331; see *Levy v Victoria* (1997) 189 CLR 579, 602 (Brennan CJ), and the more liberal approach suggested by Kirby J at 651–2; and *Attorney-General (Cth) v Breckler* (1999)197 CLR 83,134–6 (Kirby J).

107 George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28 *Federal Law Review* 365, 382–8. See also *A-G (Cth) v Breckler* (1999) 197 CLR 83, 134 (n 203).

108 B Selway, above n 44 notes the following provisions: *Crown Proceedings Act 1992* (SA) s 9; *Crown Suits Act 1947* (WA) s 8; *Crown Proceedings Act 1992* (ACT) s 11; *Crown Proceedings Act 1993* (NT) s 17; *Crown Proceedings Act 1993* (Tas) s 16, *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 18; *Judicial Review Act 1991* (Qld), s 51; *Administrative Decisions Tribunal Act* 1997 (NSW), s 69; *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) s 73; and *Judicial Review Act* 2000 (Tas), s 39.

IV THE *BISHOPS CASE* (2002) AND THE FEDERAL VORTEX OF 'MATTER'

The pragmatic approach came to a halt with the *Bishops Case* (2002).[109] This decision imposes constitutional limitations on the role of the Attorneys–General drawn from the requirement that federal jurisdiction is only exercisable in respect of 'matters' enumerated in ss 75 and 76 of the Constitution. It restricts the ability of an Attorney-General to use certiorari in certain circumstances and denies standing to an Attorney-General to enforce the validity of another jurisdiction's law. These restrictions are *federal* in character. They have no direct or necessary impact on the operation of State jurisdiction.

The complexity of the litigation in the *Bishops Case* necessitates a short description of the facts (part IV.A) and the identification of the majority and minority positions on the relationship between the constitutional concept of 'matter' and the Attorney-General's standing (parts IV.B–IV.B.2). The driving force behind the decision, and the judicial division of opinion, is a set of policy choices regarding the administration of justice. These choices have not been rendered explicit. The Court has preferred to express its conclusions on the presence or absence of a 'matter' through a particular style of doctrinal analysis (parts IV.C–IV.C.2). Certain problematic features of this style — the selective use of precedent and legal history — are analysed below (parts IV.D.1–IV.D.2). These are features of contemporary High Court reasoning which have allowed the concept of 'matter' to become something of a vortex into which the consideration of policies regarding the administration of justice disappear (part IV.D.3).

A *The Parties and the Result*

In 1995, Victoria enacted legislation restricting the availability of certain in vitro fertilisation treatments to women who were either married and living with their husbands or who were living with a man in a de facto relationship.[110] An infertile woman who did not fall into either category sought treatment from Dr McBain, a Victorian medical practitioner. McBain declined to provide treatment as this would be contrary to Victorian law. He nevertheless sought and obtained a declaration

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109 *Bishops Case* (2002) 209 CLR 372.

110 *Infertility Treatment Act* 1995 (Vic), s 8. The legislative and political backgrounds to the *Bishops Case* are analysed in more detail by Kristen Walker, '1950s Family Values vs Human Rights: In Vitro Fertilisation, Doctor Insemination and Sexuality in Victoria' (2001) 11 *Public Law Review* 292; and Kristen Walker, 'The Bishops, The Doctor, His Patient and the Attorney-General: The Conclusion of the McBain Litigation' (2002) 30 *Federal Law Review* 507.

from the Federal Court that the relevant provisions of the Victorian legislation were inoperative under section 109 of the Constitution, due to their inconsistency with the *Sex Discrimination Act 1984* (Cth).[111] The State of Victoria and the Minister responsible for the State legislation were named as respondents. However, these parties neither asserted nor conceded the inconsistency of the federal and State legislation.[112] The Victorian legislation was enacted during the term of a Liberal Government and was politically controversial. The decision not to defend the legislation was made by a subsequent Labor Government. Notice was given to the Attorneys–General of the States and the Commonwealth, yet none of the Attorneys–General chose to intervene or to remove the cause to the High Court.[113] In light of the 'neutrality' of the governmental parties, the trial judge allowed amicus curiae representing the Roman Catholic Church ('the Bishops')[114] to appear and argue for the validity of the Victorian legislation.

None of the parties appealed the trial judge's decision. If the Bishops had been a party to the proceeding, whether through joinder or intervention, they would have had a right to appeal the trial decision. As amicus curiae, they had no such right.[115] Two proceedings were nevertheless brought in the High Court's original jurisdiction seeking certiorari for a non–jurisdictional error of law by the trial judge, that error being disclosed on the face of the Federal Court record. The Bishops were the applicants in the first proceeding. The second application was brought by the

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111 *McBain v Victoria* (2000) 177 ALR 320, 322. Under section 109 of the Constitution, Commonwealth legislation prevails over State legislation; inconsistent State legislation is invalid to the extent of the inconsistency.

112 The third respondent was the Infertility Treatment Authority which administered the State Act, and licensed medial practitioners to perform the treatment. The Authority did not appear, but submitted itself to any order of the Court. The fourth respondent was the woman who had sought the fertility treatment: *McBain v Victoria* (2000) 177 ALR 320, 322; *Bishops Case* (2002) 209 CLR 372, 397 (Gaudron and Gummow JJ).

113 See above, part III.B (*Judiciary Act* procedure); *McBain v Victoria* (2000) 177 ALR 320, 322; *Bishops Case* (2002) 209 CLR 372, 398 (Gaudron and Gummow JJ) and K Walker, '1950s Family Values vs Human Rights: In Vitro Fertilisation, Doctor Insemination and Sexuality in Victoria', above n 109.

114 These parties were the Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church: see *Bishops Case* (2002) 209 CLR 372, 397 (Gaudron and Gummow JJ).

115 An intervener acquires all the procedural rights of a party and is bound by the judgment, but an amicus curiae is not a party: *Levy v Victoria* (1997) 189 CLR 579, 600–605, 650–2; *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 534.

Commonwealth Attorney-General on the relation of the Bishops.[116] The respondents to both actions were the trial judge and Dr McBain who both submitted to the Court's orders. Partly due to these peculiar circumstances, the Court permitted several non–governmental parties to intervene.[117] A further peculiarity of the High Court proceedings was the appearance of the Commonwealth Attorney-General on both sides of the record. The Attorney-General granted his fiat to the Bishops, but expressly limited the basis of the action to a submission that the *Sex Discrimination Act* does not apply to the State legislation and is not inconsistent with the State legislation. The Bishops, however, made further submissions on the construction of the *Sex Discrimination Act* which were not acceptable to the Commonwealth. As a consequence, the Attorney-General attempted to intervene in his own relator action and the Bishop's application, claiming that he had the right to do so under section 78A of the *Judiciary Act 1903* (Cth), whether or not he supported or opposed the relator.[118]

Many of the procedural problems considered by the High Court would not have arisen if the Attorney-General had intervened as a party in the Federal Court proceedings or removed the cause of action to the High Court. The problems might also have been avoided if the Attorney-General had controlled counsel for the relator more effectively in the High Court.

B *The Court's Analysis*

All members of the High Court rejected the Bishops' application, the Attorney-General's relator application, and the Attorney-General's attempts to intervene. The

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116 The relator action was filed out of time. It was therefore necessary for the Attorney-General to apply for an extension of time, a point which was highly significant in McHugh J's judgment: *Bishops Case* (2002) 209 CLR 372, 427–9.

117 The Australian Family Association intervened to support the Bishops, while the Womens' Electoral Lobby (Victoria) Inc and the Human Rights and Equal Opportunity Commission (a Commonwealth statutory authority) intervened to oppose the Bishops. See comments in the *Bishops Case* (2002) 209 CLR 372, 434–5 (Kirby J).

118 'Submissions of the Attorney-General of the Commonwealth (intervening)', 28 August 2001, para 1; and See 'Supplementary Submissions of the Attorney-General of the Commonwealth (intervening)', 14 September 2001. The Bishops had also indicated that they would seek to join the Commonwealth Attorney-General as a party to their own proceeding. The success of either application would have involved the Attorney-General making submissions which were, in part, contrary to those of the Bishops: see *Bishops Case* (2002) 209 CLR 372, 400–1, 410 (Gaudron and Gummow JJ).

Court affirmed the basic proposition that had emerged in earlier case law that:

> (a) An Attorney-General of one polity may sue another polity to enforce compliance with the Constitution.[119]

The judges also accepted the traditional proposition that there can be no 'matter', in the Chapter III sense, unless there is some immediate right, duty of liability to be established by the determination of the Court.[120] Thereafter, judicial opinion was divided. Four judges (Gleeson CJ, Gaudron, Gummow and Hayne JJ) found against the applicants on the ground that the proceedings did not constitute a 'matter' attracting federal jurisdiction. Three judges (McHugh, Kirby and Callinan JJ) found that the proceedings constituted a 'matter' but refused certiorari on discretionary grounds. The division of opinion on the requirements of a constitutional 'matter' was as stark as the High Court's controversial 4–3 decision in *Abebe v The Commonwealth*.[121]

1 *Majority – The Concept of 'Matter' Limits the Attorney-General's Role*

Three of the four majority judges found that the constitutional concept of 'matter' limits the Attorney-General's role in public interest litigation. These judges also distinguished between the roles of the Attorneys–General of the Commonwealth and the States in intergovernmental litigation. Gaudron and Gummow JJ offered the most comprehensive statement of this position.

Gaudron and Gummow JJ treated the inquiry into the existence of a 'matter' as a 'tripartite inquiry' directed at identifying the subject–matter for determination; the right, duty or liability to be established in the proceeding; and the controversy between the parties which requires the judicial power of the Commonwealth to quell it. All three inquiries are necessary.[122] Under the first and third inquiries, it was found that the subject matter for determination in the High Court proceedings had already been disposed of, and the controversy quelled, by the Federal Court. There had been a 'matter' in the Federal Court proceedings, the trial judge had discharged

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119 Ibid 404, 408–9 (Gaudron and Gummow JJ), 452–3 (Kirby J), 460–1 (Hayne J), 475 (Callinan J). Compare: above part III.A.1(iv).

120 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 266–7.

121 *Abebe v The Commonwealth*; *Re Minister for Immigration and Multicultural Affairs; ex* (1999) 197 CLR 510.

122 The same test appears in the judgments of Gummow and Hayne JJ in *Abebe v The Commonwealth,* ibid [165], who cite *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ).

his duty to exercise the judicial power, the orders had been entered, and Dr McBain had received judgment. The second inquiry resulted in a line of reasoning which implied constitutional restrictions on the role of the Attorneys–General.

Gaudron and Gummow JJ found that the litigation in the Federal Court between Dr McBain and the State of Victoria and associated parties clearly gave rise to a 'matter', as it required the Court to determine whether Dr McBain could be relieved from the obligation to observe the State law. The application in the High Court was distinguishable. The Bishops and the Attorney-General had 'no interest' in relief from the law. Theirs was an application to support the State law, motivated by their desire to remove the precedent established by the parties' acceptance of the Federal Court decision. Gaudron and Gummow JJ rejected the argument that the Commonwealth Attorney-General would have had a 'matter' if he had requested declaratory relief to affirm the validity of the State law. Such an action was apparently reserved for the Attorney-General of the polity which has enacted the legislation, and would not give rise to a 'matter' if pursued by the Attorney-General of another polity:[123]

> Normally it would be for the State Attorney-General to represent the interest of the public of that State in vindicating the laws of that State. The "particular right" of each Attorney lies in the enlisting of the judicial power of the Commonwealth to ensure observance by the other polities of the requirements of the federal compact expressed in the Constitution.

Referring to Dixon J's comments in the *Australian Railways Union* Case,[124] Gaudron and Gummow JJ held that the *Judiciary Act* procedure could not be used to re–open closed litigation in order to bring the law in line with the Attorney-General's preferred view. The constitutional concept of 'matter' and the nature of federal judicial power prohibited such an intervention:[125]

> The point may be expressed as a reflection of the limits of the judicial power of the Commonwealth or of the absence of any claim by the Attorney-General to a right, title, privilege or immunity under the Constitution which is necessary to give rise to a "matter"… Whether acting on relation or otherwise, the Attorney-General, consistently with Ch III, cannot have a roving commission to initiate litigation to disrupt settled outcomes in earlier cases, so as to rid the law reports of what are considered unsatisfactory decisions respecting constitutional law.

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123 *Bishops Case* (2002) 209 CLR 372, 409; see also 460–1 (Hayne JJ)

124 See above, text accompanying n 100.

125 *Bishops Case* (2002) 209 CLR 372, 409–10.

The objection to the Attorney-General's roving commission is the real driving force behind the majority decision. But it is presented here as a final rhetorical flourish, after the conclusion of the 'tri–partite inquiry' into the existence of a matter. It will be argued below, that the judicial abhorrence of such a roving commission is in fact the premise of a reasoning process which arrives at the conclusion that the Attorney-General's application was not a 'matter' (part IV.C.1).

Hayne J noted several bases for refusing certiorari but he agreed with the reasons of Gaudron and Gummow JJ that the applications did not give rise to a 'matter', and with the new federal limitation on the Attorney-General's role.[126] Repeating Sir Owen Dixon's dictum in the *Australian Railways Union Case*, Hayne J stated that the Commonwealth Attorney-General was contending for what he thought was a desirable state of the general law, without regard to the diminution or enlargement of the powers which the Commonwealth may exercise.[127] Gleeson CJ concluded that there was no 'matter' by finding that the question of law to be determined by the Court was divorced from any attempt by the Commonwealth Attorney-General to administer the Victorian statute.[128] He did not attribute any significance to the role of the Attorney-General in public interest litigation. His comments would have applied equally to a public interest suit brought by a citizen.

The majority's findings on the role of the Attorneys–General may be summarised in two propositions, (b) and (c):

> (b) An Attorney-General cannot, in federal jurisdiction, seek certiorari for non–jurisdictional error to quash decisions of a lower court which have been accepted by the parties.[129]

All majority judges (and the minority judges) were prepared to contemplate the right of the Attorney-General to sue in federal jurisdiction to seek certiorari for jurisdictional error in similar circumstances.[130] Proposition (c) derives from Dixon J's observations in the *Australian Railways Union Case*, and is more controversial.

> (c) An Attorney-General of one polity cannot sue in federal jurisdiction for a declaration that the law of another polity is valid. It is for the

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126 Ibid 460–1, 471.
127 Ibid 460–1.
128 Ibid 394–6.
129 Ibid 404, 408–10 (Gaudron and Gummow JJ), 463–6, 470–1 (Hayne J).
130 Ibid 394–5 (Gleeson CJ), 404 (Gaudron and Gummow J), 463, 470–1 (Hayne J).

> Attorney-General of each polity to affirm the validity of the laws of his or her polity.[131]

Propositions (b) and (c) are newly discovered implications drawn from the text of Chapter III of the Constitution. They are implications which limit the range of action that an Attorney-General may undertake. They break from the pragmatic approach adopted since 1908 (see above parts III.A–III.B) and impose a new judicial limitation on the activities that may be undertaken by a holder of a politico–legal office.

2 *Minority — The Attorney-General's Application Might Generate a 'Matter'*

McHugh, Kirby and Callinan JJ found that the applications in the High Court gave rise to a 'matter', but refused certiorari on discretionary grounds. These grounds included consideration of the following: that the relator action was made out of time; that the Attorney-General and the Bishops had failed to become parties to the Federal Court proceeding; the Attorney-General had failed to remove the cause of action to the High Court; that the trial decision was accepted by the parties to the Federal Court proceeding; and that certiorari would have a detrimental effect on persons who had relied on the trial decision.[132] All three judges indicated their support for a broad view of the constitutional concept of 'matter'. Callinan J stated that the absence of an 'immediate' right, duty, privilege or liability may not of itself indicate that a proceeding is divorced from an attempt to administer the law.[133] The most striking aspect of the minority judgments is the suggestion that the Attorney-General's application for certiorari might, by itself, generate a matter.

McHugh J, with whom Callinan J agreed, found that the proceedings gave rise to a 'matter' because the very making of a claim for certiorari gives rise to a controversy determining some immediate right, duty or liability. This is a new and different controversy from that involved in the proceedings that gave rise to the order against which certiorari is sought.[134] McHugh J relied on legal history to find that certiorari could be obtained by 'strangers' to the order or judgment.[135] The legal policy in allowing such actions is the promotion of the public interest in the administration of justice and the prevention of abuses of power by courts and tribunals. This interest was strong in cases where the losing party to an action does not appeal, and the

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131 Ibid 409 (Gaudron and Gummow JJ) and 460–1, 474–5 (Hayne J).
132 Ibid 394 (Gleeson CJ), 410–1 (McHugh J), 456 (Kirby J).
133 Ibid 476.
134 Ibid 412–3.
135 Ibid 413–22.

judgment or order made without jurisdiction will become a precedent. It is particularly strong in cases where jurisdiction depends upon questions of constitutional validity.[136] For both judges, neither the constitutional concept of judicial power nor the concept of 'matter' require an applicant to fulfil a standing requirement that he or she possess a special interest in the subject matter of the proceedings.[137] The Attorney-General's guardianship of the public interest always allowed the Attorney-General standing to apply for certiorari.[138] But whether certiorari is granted to the Attorney-General, is a matter of discretion.[139]

Kirby J offered a variety of reasons why the remedy of certiorari should be available in circumstances to correct both jurisdictional and non–jurisdictional error. Kirby J stated that any deficiency in the 'matter' presented to the High Court for adjudication could be 'side–stepped' through the Attorney-General's fiat.[140] The fiat had created a new matter which was 'different (although not unconnected)' to the Federal Court matter. The new matter was '[e]ffectively …the relator's "matter"'.[141] The High Court proceedings were validly constituted by the presence of the trial judge and Dr McBain as respondents. The submission of the respondents to the orders of the Court did not matter, as the interveners presented the Court with a live controversy, using the arguments that would have been used by Dr McBain.[142] The fiat therefore cured any defect the proceedings may have had by reason of insufficient standing or failure to meet the constitutional requirement of a matter. Kirby J also found that the Attorney-General of one polity could support the validity of another polity's statute because in cases involving the inconsistency of State and Commonwealth law, there will necessarily be argument about the meaning and operation of the law of the other polity.[143]

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136 Ibid 414.

137 Ibid 414–5.

138 Ibid 414, 422, 427.

139 Ibid 417, 420–1. A curiosity in this approach was the suggestion that, in a relator action, the Attorney-General is unable to claim the privileges and immunities that he or she might claim when representing 'the Crown' 427–8, 475 (concurrence of Callinan J). This sits uneasily with the idea that the relator's action is to be treated legally as if it were the Attorney-General's action and resurrects the distinction between the representation of the polity's interests and the representation of the interests of the people of the polity (see above part III.A.2(a)).

140 Ibid 450.

141 Ibid 450, 452.

142 Ibid 450.

143 Ibid 452.

The minority position might be summarised in two propositions. The first of these is:

(d) An Attorney-General may, in federal jurisdiction, seek certiorari for jurisdictional or non–jurisdictional error to quash decisions of a lower court which have been accepted by the parties.[144]

The minority judges ascribed to the Attorney-General a broader role in public interest litigation and did not suggest that differences might arise between the position of State and the Commonwealth Attorneys-General in intergovernmental litigation. Whether expressly or by implication, they held that:

(e) An Attorney-General of one polity may sue in federal jurisdiction for a declaration that the law of another polity is valid.[145]

3 *The Metaphysical Choice*

The minority's propositions (d) and (e) are diametrically opposed to the majority's propositions (b) and (c). The latter now represent the law. At the level of doctrinal reasoning, the division of opinion is produced through the identification of that thing *'p'* which the Court is being asked to classify as a 'matter'. The majority sees the application of the Attorney-General as bound up with the Federal Court decision. It says: 'This is all bound up in the one–and–the–same *p*. The Federal Court matter is concluded, so there can be no more 'matter' which we can look at'. This argument is entirely logical. Nevertheless, the minority position is entirely unaffected by the argument. The minority can still accept that the Federal Court proceeding is concluded,[146] but treat the Attorney-General's application as a different thing *'?'*, thereby admitting it within the category of 'matter'.

The majority and minority positions simply do not engage one another. At the base of the highly sophisticated doctrinal reasoning about 'matter' lies a brute

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144 Ibid 411, 414–5 (McHugh J) and 475 (Callinan J).

145 Expressly: 452 (Kirby J). By implication: 414–5 (McHugh J), 450, 452–3 (Kirby J) and 475 (Callinan J concurrence).

146 Thus, McHugh J states: 'The fact that the applicants were not parties to the proceedings in the Federal Court is irrelevant, as is the fact that the Federal Court order settled a controversy between the respondents. A stranger has the right to assert that the record of a court is defective… That claim of right gives rise to a justiciable controversy against the maker of the record and those who were parties to its making': *Bishops Case* (2002) 209 CLR 372, 415.

metaphysical choice — a choice between identity and difference — a choice between characterising the Attorney-General's application as *p* or *?*. The animus for this judicial choice is not immanent in the word 'matter' and cannot be found in doctrine. The constitutional concept of 'matter' has some meaning which is accepted by all the judges in the *Bishops Case*. But whatever that meaning is, it is not the force that drives the reasoning in this case, and it does not explain the difference in judicial opinion. This force is to be found elsewhere. It is to be found in the judicial weighing of competing public interests in the administration of justice. These now need to be unveiled, for they have given rise to a very serious legal consequence, namely an implication from the text of Chapter III of the Constitution of a restriction on the range of action that an Attorney-General may undertake.

C *The Policy Foundations of a New Constitutional Implication*

Following the discovery of a constitutional freedom of political communication,[147] we have become more accustomed to the phenomenon of judicially discovered constitutional implications. Implications from the text of Chapter III of the Constitution have been used to impose restrictions on Parliament's powers to enact legislation depriving persons in courts of federal jurisdiction of natural justice or 'due process',[148] to enact a bill of attainder,[149] and to enact legislation conferring upon judges certain functions as persona designata.[150] Some judges have drawn from the text an implication as to whether a trial for a federal offence could proceed without adequate legal representation.[151] Implications from the text have also been used to destroy the system of jurisdictional cross–vesting which supported the national scheme for corporate regulation known as 'the Corporations Law'.[152] Limitations upon the exercise of federal judicial power implied from the constitutional text occupy an ambiguous zone. They may be presented as limits which are constitutionally mandated, or limits which result from the exercise of prudential discretion.[153]

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147 *Australian Capital Television Pty Ltd v Commonwealth* (No 2) (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and subsequent cases.

148 L Zines, above n 97, 202–45. The following list draws from L Zines, in A Stone and G Williams (eds), above n 95, 231–2.

149 *Polyukovich v Commonwealth* (1991) 172 CLR 501.

150 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

151 *Dietrich v R* (1992) 177 CLR 292, 326, 362.

152 *Re Wakim; Ex parte McNally* [1999] HCA 27; 198 CLR 511.

153 Compare: Henry Burmester, 'Limitations on Federal Adjudication' in B Opeskin and F Wheeler (eds), *The Australian Federal Judicial System* (2000) 227–8.

Constitutional implications are not of themselves a good or a bad thing. They serve functions within the legal system. Where constitutional implications are drawn, it is the task of legal analysis to discover and assess their functions. The usual explanation for restrictions upon the exercise of federal judicial power is the separation of the judicial power from the executive and the legislative power. But this is too broad an answer to cover the detailed circumstances that arise for consideration in so many different cases. Reviewing the various rationales offered to justify limitations such as the 'matter' requirement, Henry Burmester concludes that[154]

> the ultimate explanation is that the various limitations reflect and explain the judicial understanding of the proper role of the courts in our constitutional system. No discussion of the various limitations can ignore this normative question as it determines the view one takes as to the whether the limitations have been too narrowly or broadly applied. Unfortunately, the courts tend to assert what they see as their proper role with little explanation or analysis in response to the particular situations that come before them.

Burmester's analysis is sound. The doctrinal reasoning behind limitations such as the 'matter' requirement is driven by the understandings of Chapter III courts regarding their role within the constitutional schema. In the present case, the functions served by restricting the role of the Attorneys-General are in fact the product of two policy choices regarding the administration of justice. The first choice is a decision to put the public interest in the certainty of judicially determined rights, duties and liabilities before the public interest in ensuring the legality of administration (part IV.C.1). The second choice is a decision to undercut the executive's ability to enforce public rights on a selective basis (part IV.C.2). The decision in the *Bishops Case* might be argued to advance a value associated with a federal system of government. But if this is so, that value is inadequately articulated in the majority's reasons (part IV.C.3).

Before turning to these policy choices, the reader must be cautioned from drawing the conclusion that the majority and the minority in the *Bishops Case* assessed these policies in diametrically opposed ways. The minority did not deny the considerations driving the majority's reasoning. Both minority and majority arrived at the same legal result (the refusal of the Attorney-General's application) through different means. The majority arrived there through the exercise of discretion to refuse the remedy of certiorari; the majority, through a constitutional restriction. The minority followed the standard public law practice of treating the question of

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154 Ibid 229.

standing and the merits of the action as two distinct inquiries. The majority relied on a constitutional implication hitherto unknown in case law.

1 *The Certainty of Judicially Determined Rights and Obligations Versus the Legality of Judicial Action*

One of the primary functions of the legal system is to provide a means by which the legal rights and obligations of the users of the system can be rendered certain. Where litigation has been necessary to determine these rights and obligations, the law has generated doctrines which preclude parties to the litigation and other persons from re–opening that decision in later litigation. A typical example is the doctrine of *res judicata estoppel.* Where a final judicial decision has been pronounced on the merits by a judicial tribunal with jurisdiction over the parties and the subject matter, this doctrine operates to prevent any person from disputing that decision on the merits in later litigation.[155] It is said that the doctrine is founded on the public interest in the finality of the litigation, rather than the achievement of justice between individual litigants.[156] A countervailing public interest, which underscores the system of judicial review under the principles of administrative law, is the public interest in the legality of judicial and administrative action. Where final judgment has been entered for the parties, but a non–party seeks to disturb the record of the judgment through the writ of certiorari — as occurred in the *Bishops Case* — these two policies collide.

The majority judgments express their concern for public interest in the finality of litigation. Gleeson CJ offered the example of the two taxpayers; where one taxpayer has entered into litigation with the revenue authorities and received a judgment which is then accepted by both litigants, it is objectionable to allow a second taxpayer or a concerned citizen to re–open that decision, even though the precedent may affect the interests of the second taxpayer or the citizen concerned with the effect of tax minimisation schemes.[157] The minority judgments are also alive to the same concern. In exercising their discretion to refuse the application for certiorari, these judges consider the detrimental effect that an order for certiorari would have on the parties that have already accepted the judgment as binding. McHugh J states that '[i]t would undermine the rights and settled expectations of the parties to litigation to an intolerable degree if an Attorney-General was entitled as of right to

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155 K R Handley, *Spencer Bower, Turner and Handley: The Doctrine of Res Judicata* (1996) 9.

156 *The Indian Endurance* [1993] AC 410, 415 (Lord Goff), cited in Handley, ibid, 11.

157 *Bishops Case* (2002) 209 372, 395.

obtain *certiorari* to quash *whenever* the Attorney could establish legal error or lack of jurisdiction in a court or tribunal'.[158]

The countervailing public interest in the legality of judicial decision–making receives extensive consideration in the minority judgments. Thus, in discussing the functions of certiorari, McHugh J refers to: the importance of ensuring that the prescribed order of the administration of justice is not disobeyed; the public interest in ensuring that a judgment or order made without jurisdiction will not become a precedent; the prevention of abuses of power by inferior tribunals and public authorities;[159] and the interest of the Crown, as guardian of the public interest, in seeing justice being done according to law.[160] The public interest in the legality of judicial decision–making receives no mention in the judgments of Gleeson CJ, Gaudron and Gummow JJ.[161] Nevertheless, it is clear that the majority judges do not disregard the public interest in the legality of judicial action. This is evident from the fact that all members of the majority hold that standing to seek the remedy of certiorari would be available to the Attorney-General in the case of a jurisdictional error. With the exception of Hayne J, the majority judges state this proposition in a brief aside.[162]

The majority's elliptical treatment of the public interest in the legality of judicial action means that it is never properly weighed against the public interest in the certainty of judicially determined rights (the finality of litigation). To uphold the latter interest, the majority judges simply resort to the constitutional implication restricting the ability of the Attorney-General to bring the action. In the process of doing this, two important questions regarding the administration of justice under Chapter III of the Constitution are also avoided. These are: (i) the unsatisfactory nature of the distinction between jurisdictional and non–jurisdictional error as it affects access to certiorari and the constitutional writs of mandamus and prohibition; and (ii) the co-existence of mechanisms of appeal and judicial review from the

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158 Ibid 417. See also 456 (Kirby J).

159 Ibid 413–4.

160 Ibid 414, 422.

161 Hayne J's judgment is in a slightly different category, as it contains a long analysis of the history of certiorari and its position in Chapter III of the Constitution. *Implied* in this discussion is a recognition of the public interest in the legality of judicial action.

162 *Bishops Case* (2002) 209 CLR 372, 394-5 (Gleeson CJ), 404 (Gaudron and Gummow J, restricting this to decisions from which there is no right of appeal), 463, 464–7, 470–2 (Hayne J).

decisions of courts exercising federal jurisdiction. These issues receive no consideration by five of the seven judges.[163]

2 *The Strategic Enforcement of the Law*

The *Bishops Case* presents a clear example of how Attorneys–General can engage in strategic enforcement of the law. After a change of government in Victoria, the new Attorney-General chose not to enforce the predecessor government's legislation. The Commonwealth Attorney-General chose to grant his fiat in controversial circumstances to upset a decision accepted by the parties. He sought certiorari to uphold the public interest in the legality of judicial action and the removal of a bad precedent. Yet the same Attorney-General, several months before, refused to institute contempt proceedings to vindicate the authority of the Federal Court.[164] It is remarkable that the highly political intervention by the Attorney-General in the *Bishops Case* does not generate the same analysis of the politicisation of the Attorney-General's role as it did in cases such as *Bateman's Bay* where the Attorney-General merely refused his fiat, and *Truth About Motorways* which did not involve the Attorney-General at all.[165] The problem of selective enforcement of the law is noted by Callinan J, but appears only in the margins of the other judgments.[166]

Selective enforcement of the law is an important problem for the administration of justice. The executive's conception of the public interest may change with 'the government of the day' and through other, broader socio–political processes. Public law has failed to accommodate this notion by assuming the continuing identity of the executive over time.[167] In *Bateman's Bay,* McHugh J put the case *for* the selective enforcement of laws by the executive:[168]

> There are sometimes very good reasons why the public interest of a society is best served by not attempting to enforce a particular law. To enforce a law at a

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163 The exceptions are ibid 436–4 (Kirby J in the minority), and 465–72 (Hayne J in the majority). Compare 404 (Gaudron and Gummow JJ).

164 *Australian Industry Group v Automative, Food, Metals, Engineering, Printing and Kindred Industries Union of Australia* (2001)188 ALR 653.

165 Compare the *Bateman's Bay Case* (1998) 194 CLR 247 262 (Gaudron, Gummow and Kirby JJ), 279, 284 (McHugh J) and 284 (Hayne J); and the *Truth About Motorways* (2000) 200 CLR 591, 668–9, 671 (Callinan J).

166 *Bishops Case* (2002) 209 CLR 372*,* 475-6.

167 For an intriguing analysis of this problem, see Janet McLean, 'Government to State: Globalisation, Regulation, and Governments as Legal Persons' (2003) 10 *Indiana Journal of Global Legal Studies* 173.

168 *Bateman's Bay Case* (1998) 194 CLR 247, 276–7 (McHugh J).

> particular time or in particular circumstances may result in the undermining of the authority of the executive government or the courts of justice. In extreme cases, to enforce it may lead to civil unrest and bloodshed.
> Moreover, any realistic analysis of law, politics and society must recognise that not every law on the statute books continues to have the support of the majority of members of the community or always serves the public interest. Laws that once had almost universal support in a community may now be supported only by a vocal and powerful minority. Yet to attempt to repeal them may be more socially divisive than to allow them to lie unenforced. Moreover, the interests of a society arguably are often furthered by not enforcing particular laws.

Gaudron and Gummow JJ's abhorrence of the Attorney-General's 'roving commission' to rid the law reports of objectionable precedents is presumably a rejection of these views.[169]

It would appear that the highly political nature of this problem has been avoided in different ways by the majority and the minority. The majority avoids this through the descent into the vortex of 'matter' and the constitutional implication restricting the actions of the Attorney-General. The minority avoids it through the dilution of the political question in the range of discretionary considerations used to refuse certiorari. Yet one cannot help thinking that the political dimension of the case is its crux. The judicial mistrust of the political motivations of the Attorney-General, so powerfully voiced in earlier cases, provides the animus for the way the majority chose to apply doctrinal law to the question whether there was a 'matter' — the choice described above as 'the metaphysical choice' (part IV.B.3).

3 *Federal Values?*

It might be said that in segregating the roles of the Commonwealth and the State Attorneys–General, the majority judgment is upholding a *federal* value. It must be recalled that the *Bishops Case* comes at a time when the High Court has turned its back on theories of 'co–operative federalism'.[170] But if this is so, the federal value is inadequately articulated. It is certainly not self–evident why the High Court's progressively liberal and pragmatic approach to the question of the Attorney-General's standing, dating from the *Union Label Case* in 1908 (see above, part III.A–III.A.2) should suddenly be overturned, by nothing less than an implication drawn from the constitutional text. As will be indicated below, the major federal argument used by the majority was based on an observation made by Dixon J in the

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169 *Bishops Case* (2002) 209 CLR 372 409-10 (see above, text accompanying n 125). See also Kirby J at 451.

170 See sources cited above, n 95.

Australian Railways Union Case (1930) which has been used in an inappropriate context.

D *The Position of Legal Doctrine in Judicial Method*

The *Bishops Case* comes at a time when some members of the High Court are turning to a highly formal mode of analysis of Chapter III questions which leave little room for the consideration of public policy and the consequences of constitutional adjudication.[171] Professor Zines has recently brought to attention the affection of several members of the current High Court for what they consider to be the 'strict legalism' propounded by Sir Owen Dixon.[172] Doctrine reigns supreme in this approach. But as every good advocate knows, it is highly malleable. What is dressed up through doctrinal argument as a constitutionally mandated limitation today, may be undressed tomorrow.

To conclude this analysis of the *Bishops Case,* two observations are made about techniques of reasoning which seem to divert judicial attention away from the policy considerations that affect the meaning of 'matter' under Chapter III of the Constitution. The first is the selection and presentation of precedent (part IV.D.1). The second is the shifting allegiance to the use of legal history (part IV.D.2).

1 *The Selection and Presentation of Precedent — the Owen Dixit*

The major argument of a federal character used by Gaudron, Gummow and Hayne JJ to support the constitutional restriction on the role of the Attorneys–General is put by reference to Dixon J's statement of principle in the *Australian Railways Union Case*.[173] It will be recalled (see above part III.B) that in that case, Dixon J refused two States the right to intervene in a High Court proceeding in support of the Commonwealth's intervention. Dixon J said that normally only parties are allowed to intervene, that the intervention by Attorneys–General was the result of a 'very special practice', and that the High Court should use its discretion wisely in allowing such applications. There are several reasons why one should doubt the persuasive authority of this statement of principle.

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171 See L Zines, in A Stone and G Williams (eds), above n 95, 231–8; and H Burmester, above n 153.

172 Leslie Zines, 'Legalism, Realism and Judicial Rhetoric in Constitutional Law' (Paper presented at the Sir Maurice Byers Lecture, New South Wales Bar Association 2002).

173 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 330. See above, text accompanying n 100.

Firstly, on a Bench of five judges in the *Australian Railways Union Case*, Dixon J was alone in citing a constitutional consideration for the refusal of leave in this case. Isaacs CJ granted leave, stating that 'any State has a right to come into [the High Court] and defend its own personal legal territory, and also any legal territory that it thinks will conduce to its welfare'.[174] Gavan Duffy, Rich and Starke JJ refused leave simply because there were a 'great number of counsel' already at the Bar table who could put and oppose the arguments. They thought that '[a]n appearance by the States would be utterly useless'.[175]

Secondly, Dixon J's statement was made in the context of intervention and not standing to bring a proceeding. When the modern High Court has discussed the rules for intervention, as it did in *Levy v Victoria* (1997),[176] it has not applied the rules for standing. When the modern High Court has determined rules of standing, as it did in *Croome v Tasmania* (1997) and the *Bateman's Bay Case* (2002),[177] it has not applied the rules for intervention. Given the very different considerations about the nature of proceedings which they address, it is unusual to see co–mingled the two streams of authority. However, the co–mingling of authority allows the majority to avail itself of the more restrictive standard used in cases of intervention.

Thirdly, Dixon J himself would not have wanted the Constitution to be read out of the context of the general law.[178] Since 1930, much has changed in the law of standing. Dixon J's conception of standing and intervention was heavily steeped in the private law model of litigation. This model had configured most of the general law of standing up until the introduction of the 'special interest' test in the *Australian Conservation Fund Case* (1980) and *Onus v Alcoa* (1981).[179] The Court no longer requires the public interest litigant to show a personal right, duty or liability to be determined. To repeat Dixon J's caution in abstraction from its historical context would be inappropriate in the light of subsequent legal developments.

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174 Ibid.

175 Ibid 330–1.

176 *Levy v Victoria* (1997) 189 CLR 579.

177 *Croome v Tasmania* (1997) 191 CLR 119; and the *Bateman's Bay Case* (1998) 194 CLR 247.

178 Compare: Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240 (reprinted in Woinarski (ed), *Jesting Pilate* (1965); and Owen Dixon, 'The Law and the Constitution' in Woinarski (ed), *Jesting Pilate* (1965).

179 *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 439; and *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27.

Fourthly, although the facts of the *Australian Railways Union Case* reveal that an Attorney-General's application to support the validity of the law of another polity was refused, no such limitation comes from Dixon J's words themselves. In his statement of principle, Dixon J postulated no restriction on the types of action polities could bring in order to maintain rights, powers or immunities. That is to say, he did not suggest that a polity could only argue *against* the constitutional validity of another polity's legislation or the validity of its own legislation.

Once the reverence for Dixon J's statements is put aside, and the statement is carefully analysed, the persuasive value of the *Owen dixit* evaporates. Against Dixon J's restrictive statement (in a case of intervention) stands almost a century of liberal and pragmatic standing decisions which do not inhibit the Attorneys–General (above parts III.A–III.A.2). One queries why the *Australian Railways Union* precedent has been selected while others have been ignored. Implications from the constitutional text ought perhaps not to be made so lightly.

2 *The Use of Legal History*

Although it is clear that a remedy such as habeas corpus could be sought by a person other than the person set free by the writ, the extent to which the ordinary person had standing to vindicate a public right through the other prerogative writs is a matter of genuine legal historical debate.[180] Commenting in the US academic context, Clanton's research has cast doubt on claims made by scholars such as de Smith, Wade and Henderson that strangers had standing to seek the writs as of right.[181] Commenting on Australian debates, Aronson and Dyer observe that several members of the Court have cited old prerogative remedy cases in support of the notion of a pure public interest suit when '[f]ew, if any, of the older prerogative cases were in fact more lenient to applicants than the "special interest" test stipulated for declaratory and injunctive relief', in the *Australian Conservation Foundation Case* and *Onus v Alcoa*. In effect, Aronson and Dyer charge the High Court with historical revisionism.[182] They imply that the Court's motive is to secure an expansive conception of standing under the constitutional remedies of mandamus, prohibition and injunction.

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180 See M Aronson and B Dyer, above n 36, 540–5; and A J Harding, *Public Duties and Public Law* (1989) 6.2.

181 B S Clanton, 'Standing and the English Prerogative Writs: The Original Understanding' (1997) 63 *Brooklyn Law Review* 1001.

182 Their attention is mainly directed at the *Bateman's Bay Case* (1998) 194 CLR 247, 263 (Gaudron, Gummow and Kirby J) and 280 (McHugh J).

It is difficult to assess these claims without detailed historical research based on primary materials. Nevertheless, one observation may be made. With the exception of Hayne J, the majority does not engage in historical analysis on the question whether a stranger has standing to seek certiorari. Yet in other cases, such as *Bateman's Bay* and *Re Refugee Review Tribunal; ex parte Aala* (2000), the same majority judges were actively engaged in historical arguments when claims are made about the nature of the sister remedy of prohibition.[183] Staking a claim over the origin of a legal rule exercises a legitimating force on the genealogy of precedent which flows from it.[184] Likewise, depriving a legal rule of an ancient origin would appear to deligitimate it. These are accepted phenomena in judicial reasoning. Yet one must question the persuasiveness of these types of historical analysis to the questions at hand in contemporary cases. The prerogative writs developed around a system of justice and administration which is foreign to that of twenty-first century Australia. In any case, the effect of the decision in *Re Refugee Review Tribunal; ex parte Aala* (2000)[185] is to divorce the jurisprudence of the 'constitutional writs' from its historical antecedents in the 'prerogative writs'. A writ such as certiorari, though not mentioned in section 75(v) of the Constitution, is frequently granted in constitutional adjudication. Its interpretation should also follow the times.

V CONCLUSION

The foregoing analysis has demonstrated that the High Court adopted a liberal and pragmatic approach to the question of the standing of the Attorneys-General in public interest litigation from the time of the *Union Label Case* (1908).[186] Towards the end of the twentieth century, the Attorney-General of any polity could gain standing simply by showing that he or she was seeking to enforce compliance with the Constitution. This approach was reinforced by a system of statutory rights of removal of causes to the High Court and rights of intervention in proceedings where constitutional matters were raised. It also occurred against the background of ever broadening standing rules for actions brought by citizens. The liberal and pragmatic approach to the role of the Attorneys-General was halted in the *Bishops Case*

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183 *Truth About Motorways Case* (2000) 200 CLR 591, 627–8 (Gummow J), 652–3 (Kirby J); *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82, 93–9 (Gaudron and Gummow JJ).

184 Compare: Michel Foucault, 'Nietzsche, Genealogy, History' in D Bouchard (ed), *Language, Counter-Memory, Practice: Selected Essays and Interviews* (1977).

185 *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82.

186 *Union Label Case* (1908) 6 CLR 469.

(2002).[187] In the peculiar fact situation of that case, all judges refused the Commonwealth Attorney-General the remedy of certiorari. A majority of judges did so on the basis that the Attorney-General could not show the existence of a 'matter' as required for the exercise of federal judicial power under Chapter III of the Constitution. The Attorney-General therefore had no standing. A minority found that the Attorney-General had a matter and therefore standing, but refused relief on discretionary grounds. The majority derived from the concept of 'matter' a new constitutional implication which limits the range of action that may be taken by the Attorney-General of each polity in the federation.

The analysis of the *Bishops Case* reveals some of the problems generated by the High Court's approach to doctrinal analysis in recent Chapter III cases. The majority and minority used the same body of precedent to make diametrically opposed findings about the existence of a 'matter'. The animus for these findings cannot be found in the concept of 'matter' itself nor the body of case law which surrounds it. It is to be found in judicial choices about competing public interests in the administration of justice and the Court's response to the problem of selective political enforcement of the law. This paper has sought to uncover this public policy dimension, and to illustrate how certain features of contemporary judicial reasoning have the effect of marginalising such considerations.

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187 *Bishops Case* (2002) 209 CLR 372.